



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

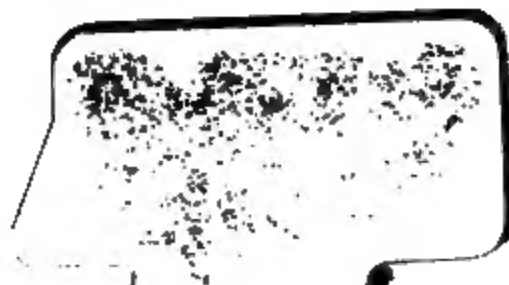






[LL]

U . S . A .  
Fla . 100  
5















**CASES ARGUED AND ADJUDGED**  
**IN THE**  
**SUPREME COURT**  
**OF FLORIDA,**  
**DURING THE YEARS 1883-4.**

---

**REPORTED BY**  
**GEORGE P. RANEY,**  
**Attorney-General.**

---

**VOLUME XX—PART I.**

---

**TALLAHASSEE:**  
**PRINTED AT THE FLORIDIAN BOOK AND JOB OFFICE**  
**1884.**





# JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

---

HON. EDWIN M. RANDALL, Chief Justice.

HON. JAMES D. WESTCOTT, JR.,  
HON. R. B. VAN VALKENBURGH, } Associate Justices.

---

ATTORNEY-GENERAL.

GEORGE P. RANEY.

---

CLERK SUPREME COURT.

CHARLES H. FOSTER.

---

JUDGES OF THE CIRCUIT COURTS.

---

FIRST CIRCUIT—HON. AUGUSTUS E. MAXWELL.

SECOND CIRCUIT—HON. DAVID S. WALKER.

THIRD CIRCUIT—HON. ENOCH J. VANN.

FOURTH CIRCUIT—HON. JAMES M. BAKER.

FIFTH CIRCUIT—HON. THOMAS F. KING.

SIXTH CIRCUIT—HON. H. L. MITCHELL.

SEVENTH CIRCUIT—HON. WM. ARCHER COCKE.





# Table of Cases.

---

	PAGE.
AEtna S. F. E. Company, City of Jacksonville v.....	100
Anderson v. State .....	381
Atkinson, Pensacola & Atlantic R. R. Co., v.....	450
Avery <i>et al.</i> v. City of Pensacola .....	551
Baker, Circuit Judge <i>et al.</i> , State <i>ex rel.</i> v. ....	616
Ballard <i>et al.</i> v. Eckman & Vetsburg .....	661
Basnett <i>et al.</i> , City of Jacksonville v. ....	525
Belote v. O'Brian's Admr. ....	126
Benner <i>et al.</i> , Street <i>et al.</i> , v .....	700
Blackshear & Co., West v. ....	457
Blanchard <i>et al.</i> v. Raines .....	467
Blige v. State .....	742
Bradley v. State .....	738
Brittain <i>et al.</i> , Florida Savings Bank v. ....	507
Brokaw v. McDougall <i>et als.</i> .....	212
Brown, State <i>ex rel.</i> v. ....	407
Campbell v. Spratt <i>et al.</i> .....	122
Canepa, Executor, Eppinger, Russell & Co. v. ....	262
Caro v. Maxwell .....	17
Carter v. State .....	754
Carter's Administrators v. Carter <i>et al</i> .....	558
Carter's Administrators, Horne v. ....	45
Chesser <i>et al.</i> , v. DePrater .....	691
City of Jacksonville v. AEtna S. F. E. Company.....	100
City of Jacksonville v. Basnett <i>et al.</i> .....	525
City of Jacksonville v. L'Engle .....	344, 352
City of Pensacola, Avery <i>et al.</i> v. ....	551

	PAGE.
City of Pensacola v. Reese .....	437
Coffee v. Groover .....	64
Coker v. Dawkins .....	141
Coleman, Jeffreys <i>et al.</i> v. ....	536
Commissioners of Jefferson County State <i>ex rel.</i> v. ....	425
Cooper, County Judge, State <i>ex rel.</i> v. ....	547
Dawkins, Coker v. ....	141
Deans v. King's Executrix .....	533
DePrater, Chesser <i>et al.</i> v. ....	691
Dunbar v. Wright's Adm'r. ....	446
Eckman & Vetsburg, Ballard <i>et al.</i> v. ....	661
Eldridge, Dunham & Co. v. Post .....	579
Eldridge <i>et ux.</i> v. Wightman & Christopher .....	687
Endell <i>et al.</i> , Walls v. ....	86
Eppinger, Russell & Co. v. Canepa, Executor .....	262
Ernest v. State .....	383
Fridenburg v. Wilson, Executrix <i>et als.</i> .....	359
Florida Savings Bank v. Brittain <i>et al.</i> , .....	507
Gagnet v. Reese .....	438
Gainer <i>et al.</i> v. Russ .....	157
Gale <i>et ux.</i> v. Harby <i>et al.</i> .....	171
Gilchrist's Executor <i>et al.</i> , McDougald <i>et al.</i> v. ....	573
Groover, Coffee v. ....	64
Harby <i>et al.</i> Gale <i>et ux.</i> v. .... L L. ....	171
Hart's Executor v. Smith .....	58
Hart, Executrix <i>et als.</i> , Stribling <i>et ux.</i> v. ....	235
Hayden v. Thrasher <i>et al.</i> .....	715
Horne v. Carter's Administrators .....	45
Howard v. Moore <i>et al.</i> , .....	163
Howe v. Robinson <i>et ux.</i> , .....	352
Hubbard, McClenny v. ....	541
Hutchinson, Richardson v. ....	21
Jacksonville, T. & K. W. R. Co. <i>et als.</i> Moody <i>et ux.</i> v. ....	597

	PAGE.
Jacksonville, T. & K. W. R. Co., State <i>ex rel.</i> v. ....	616
Jeffreys <i>et al.</i> v. Coleman .....	536
Joiner, Mills <i>et ux.</i> v. ....	479
King, Circuit Judge, State <i>ex rel.</i> v. ....19,	399
King's Executrix, Deans v. ....	533
Knight <i>et al.</i> v. Weiskopf <i>et al.</i> , .....	140
Knox <i>et al.</i> , Montgomery <i>et al.</i> v. ....	372
Lake's Administrator, Snow <i>et al.</i> v. ....	656
L'Engle, City of Jacksonville v. ....344,	352
Longe, Smith v. ....	697
Maxwell, Caro v. ....	17
McClenny v. Hubbard .....	541
McDougall <i>et als.</i> , Brokaw v. ....	212
McDougall <i>et al.</i> v. Gilchrist's Executor <i>et al.</i> ....	573
McLean v. Spratt .....	515
McLean v. Spratt <i>et al.</i> .....	122
Merritt & Son v. Wittich .....	27
Metzger <i>et al.</i> , Price v. ....	683
Mills <i>et ux.</i> v. Joiner .....	479
Montgomery <i>et al.</i> v. Knox <i>et al.</i> .....	372
Moody <i>et ux.</i> v. Jacksonville, T. & K. W. R. Co. <i>et als.</i> .....	597
Moore <i>et al.</i> , Howard v. ....	163
Neal <i>et al.</i> v. Spooner <i>et al.</i> .....	38
Nims v. Nims .....	204
O'Brian's Adm'r., Belote v. ....	126
Pensacola & Atlantic R. R. Co. v. Atkinson .....	450
Post, Eldrige, Dunham & Co. v. ....	579
Price v. Metzger <i>et al.</i> , .....	683
Raines, Blanchard <i>et al.</i> v. ....	467
Reese, City of Pensacola v. ....	437
Reese, Gagnet v. ....	438
Richardson vs. Hutchinson .....	21
Robinson <i>et ux.</i> , Howe v. ....	352

	PAGE.
Ross, Keen & Co., v. Steen .....	443
Rushing <i>et ux.</i> v. Thompson's Executors .....	583
Russ, Gainer <i>et al.</i> v. ....	157
Sanderson v. Sanderson's Admrs. ....	292
Sanderson's Administrators v. Sanderson .....	292
Simmons <i>et al.</i> v. Spratt .....	495
Singer Manufacturing Company v. Spratt <i>et al.</i> ....	122
Smith, Hart's Executor v. ....	58
Smith v. Longe .....	697
Snow <i>et al.</i> v. Lake's Adm'r. ....	656
Spooner <i>et al.</i> , Neal <i>et al.</i> v. ....	38
Spratt, McLean v. ....	515
Spratt <i>et al.</i> , Campbell v. ....	122
Spratt <i>et al.</i> , McLean v. ....	122, 515
Spratt <i>et al.</i> , Singer Manufacturing Company v....	122
Spratt, Simmons <i>et al.</i> v. ....	495
State, Anderson v. ....	381
State, Blige v. ....	742
State, Bradley v. ....	738
State, Carter v. ....	754
State, Ernest v. ....	383
State, Williams v. ....	391
State <i>ex rel.</i> v. Baker, Circuit Judge, <i>et al</i> .....	616
State <i>ex rel.</i> v. Brown .....	407
State <i>ex rel.</i> v. Commissioners of Jefferson County....	425
State <i>ex rel.</i> v. Cooper, County Judge .....	547
State <i>ex rel.</i> v. Jacksonville, T. & K. W. R. Co.....	616
State <i>ex rel.</i> v. King, Circuit Judge .....	19, 399
State <i>ex rel.</i> v. Trustees I. I. Fund .....	402
Steen, Ross, Keen & Co. v. ....	443
Street <i>et al.</i> v. Benner <i>et al.</i> .....	700
Stribling <i>et ux.</i> v. Hart, Executrix, et als .....	235
Sullivan v. Walton .....	552
Thompson's Executors, Rushing <i>et ux.</i> v. ....	583
Thrasher <i>et al.</i> , Hayden v. ....	715

# TABLE OF CASES.

IX

	PAGE.
Trustees I. I. Fund, State <i>ex rel.</i> v. ....	402
Walls v. Endell <i>et al.</i> ....	86
Walton, Sullivan v. ....	552
Weiskopf <i>et al.</i> , Knight <i>et al.</i> v. ....	140
West v. Blackshear & Co. ....	457
Wightman & Christopher, Eldridge <i>et ux.</i> v. ....	687
Williams v. State ....	391
Wilson, Executrix, <i>et als.</i> , Fridenburg v. ....	359
Wittich, Merritt & Son v. ....	27
Wright's Adm'r. Dunbar v. ....	446







### **NOTE.**

**Part II. of this Volume will be composed of the cases decided and to be decided at the June Term 1884, and will be issued in December. The Term has been adjourned to November. The analytical Index for both Parts will be issued with Part II.**

**September 5, 1884.**

**REPORTER.**





Decisions  
OF THE  
Supreme Court of Florida,  

---

JUNE TERM, A. D. 1883,  

---

A. V. CARO, PETITIONER, vs. A. E. MAXWELL, JUDGE OF THE  
CIRCUIT COURT, RESPONDENT.

An appeal does not lie from an order of the Circuit Court imposing a fine for a contempt in violating an injunction; nor will a mandamus be granted to compel the approval of an appeal bond in such a case.

This is an application to the Supreme Court for a mandamus. The facts are as follows:

The petitioner states in his petition that he was served in June, 1883, with a rule from the Circuit Court of Escambia county, to show cause why he should not be punished for contempt for disregarding an injunction issued by such court; and after giving the proceedings on such rule states that the Circuit Judge, after hearing the evidence and argument of counsel, adjudged him to be guilty of violating the injunction and imposed on him a fine of one hundred dollars and the costs. He further represents that he gave notice of his intention to appeal to the Supreme Court and the Circuit Judge fixed the amount of the appeal bond at

---

 Caro v. Maxwell—Opinion of Court.
 

---

\$200, and afterwards on his presenting the bond, signed by good and sufficient sureties, the Judge refused to approve it, and directed the clerk of the court not to approve it “upon the pretext and assumption that no appeal lies from the decision of the Circuit Court in such matters”; and he states he is confined in jail in consequence of this “arbitrary, and unwarranted action” of the Judge, and prays a writ of mandamus to compel the Judge or Clerk to approve the bond and allow an appeal.

*Elliott, Tucker & Thompson* for Petitioner.

THE CHIEF-JUSTICE delivered the opinion of the court.

Application for a writ of mandamus to compel the Judge to approve an appeal bond in case of an appeal attempted to be taken, by Caro, from an order adjudging him guilty of a contempt in violating an injunction issued by the court, and imposing a fine therefor.

An appeal will not lie in such case, as matters of contempt of the authority of a court are entirely within the province of the court adjudging the same, and not subject to be reviewed upon writ of error or appeal. *Easton vs. The State*, 39 Ala., 551; *Ex-parte Summers*, 5 Iredell, 149; *The State vs. Tipton*, 1 Blackf., 166; *Ex-parte Kearney*, 7 Wheat., 38; *Ex-parte Stickney*, 40 Ala., 160; *Cossart vs. State*, 14 Ark., 538; *Bunch vs. State*, 14 ib., 544; *Ware vs. Robinson*, 9 Cal., 107; *Howard vs. Durand*, 36 Ga., 346; *Hunter vs. State*, 6 Ind., 423; *First Cong. Ch. vs. Muscatine*, 2 Iowa, 69; *Bickley vs. Com.*, 1 J. J. Mar., 575; *Turner vs. Com.*, 2 Met., (Ky.) 619; *Watson vs. Thomas*, 6 Litt., 248; *People vs. Simonson*, 9 Mich., 492; *Romeyn vs. Caplis*, 17 Mich., 449; *State vs. Towle*, 42 N. H., 540; *Coryell vs. Holcombe*, 9 N. J. Eq., 650; *Johnston vs. Com.*, 1 Bibb, 598; *Case of Yates*, 4 Johns. R., 443; *Buel vs.*

---

---

The State ex rel. v. King—Opinion of Court.

---

---

Street, 9 Johns. R., 443; McCredie vs. Senior, 4 Paige, 378; People vs. Sturtevant, 9 N. Y., 263; State vs. Sheriff, 1 Mill., (S. C. Court,) 145; Martin's Case, 5 Yerger, 456; Casey vs. State, 25 Tex., 380; Vilas vs. Burtow, 27 Vt., 56; *In re* Cooper, 32 Vt., 253; *Ex-parte* Edwards, 11 Fla. Writ denied.

---

THE STATE OF FLORIDA EX REL. TURNER GRAY, RELATOR,  
VS. THOMAS F. KING, JUDGE OF THE CIRCUIT COURT, RE-  
SPONDENT.

There is no provision of the statute authorizing a change of venue in criminal cases upon the ground that the Judge of the Circuit Court is disqualified. Relief may be had by the assignment of another Judge to hold the court and try the cause.

*S. Y. Finley* for Relator.

The facts are stated in the opinion.

THE CHIEF-JUSTICE delivered the opinion of the court.

Relator alleges that he has been indicted in Alachua county for murder and is confined in prison; that respondent, who is now the Judge of the Circuit Court of the Fifth Circuit, was acting as an attorney and prosecuted relator before the examining magistrate, and is disqualified to act as Judge at the trial of the indictment; that he has made application to the said Judge for a change of venue to another Circuit on account of said disqualification, but the Judge refused to order the change.

To an alternative writ the Judge makes return, not denying the allegations of the relator, but says that he has

---

---

The State ex rel. v. King—Opinion of Court.

---

---

applied to the proper authority to have assigned a Judge from another Circuit to hold the next term so that petitioner may be tried in the county of Alachua. That a large number of witnesses will be in attendance at the trial, as he has occasion to know, and that a trial in another county will be attended with large expense, and the public interest will be best promoted by a trial in Alachua county, and the due administration of justice does not require a change.

The matter is submitted upon the alternative writ and this return.

The first, second and third sections of Chapter 373, Laws of 1850-1, are framed with reference to the transfer of civil suits. McClellan's Dig., 336, Secs. 23, 24 and 25. They are operative in connection with each other. The provisions in respect to taking the testimony of witnesses residing out of the county, the payment of the costs by the petitioner, &c., are not appropriate to criminal cases.

Neither does the act of 1828 seem to be applicable to criminal cases. McC. Dig., 837, Sec. 112.

Section 13 of sub-Chapter 13 of Chapter 1637, Laws of 1868, (McC. Dig., 449, Sec. 26,) provides that "all criminal causes shall be tried in the county where the offence was committed, except when otherwise provided by law, unless it shall appear to the satisfaction of the court by affidavit that a fair and impartial trial cannot be had in such county; in which case the court may direct the person accused to be tried in some adjoining county where a fair and impartial trial may be had; but the party accused shall be entitled to but one change of the place of trial."

An act of 1845 provides for a change of venue in cases where it is impracticable to get a qualified jury. McC. Dig., 449, Sec. 25.

The act of 1868 (Dig., p. 449, Sec. 27,) relates to counties



---

---

Richardson et al. v. Hutchinson—Syllabus.

---

---

where there are not sufficient registered voters to form grand and petit juries.

These are the only laws in force expressly applicable to changes of venue in criminal cases, or authorizing such changes. The present case is not embraced in any of these statutory provisions.

The Constitution [Sec. 7 of Art. 6—REP.] has authorized the Chief-Justice to order temporary exchange of Circuits by the Circuit Judges, or to designate a Judge to hold a term of court in another Circuit than that for which he was appointed. The provision will fully meet the case of the relator, if the Judge of the Fifth Circuit is actually disqualified by having been, before taking office, retained as attorney to prosecute him in the magistrate's court. No statute relating to a change of venue under the circumstances stated by the relator is in force.

The alternative writ is quashed.

---

CHARLES RICHARDSON, ET AL., APPELLANTS, VS. W. H. HUTCHINSON, APPELLEE.

1. The effect of a consignment of goods generally is to vest the property in the consignee, but if the bill of lading is special to deliver the goods to the consignee for the use of or an account of a party not the consignee the property vests in such party.
2. In such case the bill of lading is *prima facie* evidence of the fairness of the transaction, and is sufficient to raise a presumption of property in the person for whose use and account the consignment is made.
3. Where, however, the consignment thus made is by an insolvent debtor and there are facts and circumstances from which the jury might infer that the transaction was colorable and fraudulent, and that

---

---

Richardson et al. v. Hutchinson—Opinion of Court.

---

---

there was nothing due to the party on whose account the shipment was made, a verdict of a jury thus finding, approved by the Circuit Court, should not be set aside by this court.

4. General statements of an insolvent debtor as to the amount of his indebtedness to one of two contending creditors, both the insolvent debtor and such one of the contending creditors failing to give any itemized account or clear exhibit of the alleged debt, cannot be regarded as conclusively establishing the debt in a case surrounded with other suspicious circumstances.

Appeal from the Circuit Court for Escambia county.

The facts of the case are stated in the opinion.

*Gustavus A. Stanley* for Appellants.

*E. A. Perry and John C. Avery* for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an action of replevin wherein Charles Richardson, Ephraim T. Walton and Francis N. Buck, partners doing business in the city of Atlanta, Georgia, under the name of Walton, Whann & Co., are plaintiffs and W. H. Hutchinson, the Sheriff of Escambia county, is defendant.

The property, which is the subject of the suit, is nineteen bales of cotton taken possession of by the Sheriff, under an attachment, as the property of C. S. Yarbrough & Co., a firm doing business in Geneva, Alabama, and consisting of C. S. Yarbrough, J. A. Fleming, T. J. Fleming and H. C. Yarbrough—T. J. Fleming and H. C. Yarbrough being the business managers of the firm. The attachment under which the property was taken possession of by the sheriff was issued at the instance of Sigismound Haas, "a Cotton Commission Merchant" doing business in Mobile, Alabama, under the name of S. Haas & Co. The defendant filed three pleas. First. The general issue. Second. A plea denying

---

---

Richardson et al. v. Hutchinson—Opinion of Court.

---

---

right of possession. Third. That the defendant was, and is entitled to the possession of the property.

Plaintiff took issue upon the pleas. There was trial and verdict for the defendant. The plaintiffs moved for a new trial upon the ground that the verdict was contrary to the evidence and contrary to the charge of the court. Their motion was denied, and there was final judgment against the plaintiffs in the sum of one thousand, forty-three and twenty-eight one-hundredth dollars damages and costs. From this judgment this appeal is taken. There were no exceptions to the charge of the court and the ground upon which a reversal is here sought is alleged error of the court in denying plaintiffs' motion for new trial.

The plaintiffs claim that the evidence shows that "the cotton in controversy was shipped at Geneva, Alabama, by the firm of C. S. Yarbrough & Co., or by a member of that firm, under a bill of lading consigned to Robbins, Wilson & Co., of Mobile, for account of the plaintiffs, to whom C. S. Yarbrough & Co. were largely indebted at the time, and that they took a bill of lading from the carrier to deliver the goods to Robbins, Whann & Co., for the use and on account of Walton, Whann & Co., and that the purpose was to pay or secure a debt due by the firm of C. S. Yarbrough & Co., the consignor, to Walton, Whann & Co.

If the result of the evidence, no question of credibility or material conflict being involved, is to establish these facts, then upon the taking of the bill of lading from the carrier the property at once passed to Walton, Whann & Co., and was not subject to attachment for a debt of the consignor, C. S. Yarbrough & Co., and the verdict of the jury should have been set aside as contrary to law. *Gilmer vs. Grove et al.*, 8 How., U. S., 429. The effect of a consignment of goods generally is to vest the property in the consignee; but if the bill of lading is special to deliver

---

---

Richardson et al. v. Hutchinson—Opinion of Court.

---

---

the goods to the consignee for the use of or on account of a third party, the property vests in such third party. There is here a bill of lading, the consignee being Robbins, Wilson & Co., but it is a special consignment on account of Walton, Whann & Co., and the property, so far as the bill of lading is concerned, vested in them. The bill of lading is in evidence, and the rule is that it is sufficient to raise a presumption of property in the person for whose use or account the consignment is made. *Lawrence vs. Minturn*, 17 How., 107; *The Sally Magee*, 3 Wall., 457; *Halliday vs. Hamilton*, 11 Wall., 560; *The Vaughn and Telegraph*, 14 Wall., 266.

The defendant admits that he holds this cotton as the property of C. S. Yarbrough & Co. He has so attached it, and looking to the testimony we do not see how the jury could find for the defendant except upon the ground of fraud, in that it was a colorable shipment and there was nothing due by C. S. Y. & Co. to Walton, Whann & Co.

The shipment was made in the name of C. S. & T. J. Yarbrough, not in the name of C. S. Yarbrough & Co., who owned the property. There is no evidence here to show any property in this cotton in C. S. & T. J. Yarbrough or T. H. Yarbrough & Co. It cannot be denied that the cotton belonged to C. S. Yarbrough & Co., according to the testimony. It is possible that the facts that the bill of lading was taken by C. S. & T. J. Yarbrough, and that the letter advising of the consignment was signed by C. S. & T. J. Yarbrough, had undue weight with the jury. Looking at the whole testimony these facts might have perhaps been explained. Some of the witnesses who testify to these facts knew nothing of the ownership beyond what appeared on the bill of lading and letter, while the simple reading of the testimony of the other witnesses, who were familiar with the circumstances attending the shipment, and who

---

**Richardson et al. v. Hutchinson—Opinion of Court.**

---

made the shipment, shows that C. S. & T. J. Yarbrough did not even claim the cotton, and that the shipment, while in their name, was really a shipment by them as warehousemen and agents for C. S. Yarbrough & Co. Another portion of the testimony, which we think the jury may have allowed to influence them to find for the defendant, is that which shows, to say the least of it, the extreme bad faith of C. S. Yarbrough & Co. to S. Haas & Co. C. S. Yarbrough & Co., had promised to ship S. Haas & Co. their cotton. They had received advances in money from them, and promised such shipment. This, however, was a mere agreement to ship produce in satisfaction of advances, which did not give the factor, Haas & Co., a right of property in, or the right of possession of, or a lien upon the cotton as against other creditors.

Notwithstanding all this we cannot say, looking at the whole of the record, that any indebtedness of C. S. Y. & Co. to W. W. & Co., is so clearly established under rules of evidence controlling the subject that the verdict of the jury should be set aside.

The plaintiffs here do not produce any itemized account or even any statement of an indebtedness of C. S. Y. & Co. to them. The same is true of C. S. Y. & Co. The witnesses, except one who was connected with that firm, simply say that they, C. S. Y. & Co., were indebted to W. W. & Co. in an amount equal to or in excess of the value of the cotton, while one of the witnesses, who was employed in the firm, states his opinion to be that on a settlement W. W. & Co. would be indebted to C. S. Y. & Co. The plaintiffs, Walton, Whann & Co., prove no indebtedness. They are not witnesses. Whatever claim they had could have been readily proved. According to the marks on the 23 bales of cotton four only were in the usual mark (W. W.) by which the cotton belonging to or intended for W. W. & Co.

---

---

Richardson et al. v. Hutchinson—Opinion of Court.

---

---

was identified. One witness swears that the four bales were received for W. W. & Co. on guano account, and the remaining 19 were purchased by C. S. Y. & Co. and were their property. It is also shown that the firm of C. S. Y. & Co. ceased business and was insolvent upon the day of the shipment; that the shipment, instead of being in the name of the firm, was in another name, made by one of the partners in this manner as he admits because "we (the firm C. S. Y. & Co.) did not wish the cotton to go in our mark for fear some one would attach it for account of C. S. Y. & Co."

A bill of lading is an instrument which states the contract between the shipper and carrier. It does not purport to disclose the relation between consignor and consignee whether the consignment be general or special so far as antecedent transactions or existing debts are concerned. It is not like a deed or promissory note which recites a consideration between the parties. It is not the practice of the courts to give in a contract of this character, to general statements of insolvent debtors a large amount of confidence or a conclusive effect. "The objection to such evidence is that it could at any time be manufactured and by means of it a creditor might be defeated, as it would in most cases be impracticable to prove a negative or to disprove the consideration said by his debtor to have passed from another." *McCain vs. Wood*, 4 Ala., 264.

Under all the circumstances narrated we are not prepared to say that the jury erred in finding that the transaction was colorable and fraudulent as against the attaching creditor, and that there was no property or right of possession in plaintiffs. It is hardly necessary to make citations here showing how disinclined this court is to interfere with the

---

---

Merritt & Son v. Wittich—Syllabus.

---

---

discretion of the Circuit Court and the findings of a jury in that court under unexceptionable instructions.

Judgment affirmed.

---

L. M. MERRITT & SON, APPELLANTS, vs. W. L. WITTICH,  
APPELLEE.

1. Where a party sells and delivers to another party at a port of entry in this State a quantity of timber on board a ship, and guarantees the same to be of "the season's manufacture, and of fair average quality, the measurement to overrun the specifications," the measure of damages to be recovered in an action for a breach of the contract is controlled by the difference in the value of the timber in the market where the contract was made, and the timber delivered.
2. The refusal of the court to receive evidence in such a case of the difference in such value in the market of Liverpool, where the contract does not provide for such an assessment of damage, and where there is no allegation in the declaration that the damage was there to be assessed, is not error.
3. The contract or agreement of parties in Liverpool for the purchase and sale of such timber, to receive from their consignor, in Pensacola, a certain sum in full for damages on a breach of such contract to be completed in Liverpool, is not evidence of the value of the timber as guaranteed in Pensacola, and its market value in Pensacola.
4. The general rule is, "That damages recoverable will be calculated at the market value of the goods at the time and place when and where they ought to have been delivered." "And evidence of the value of such goods in a foreign market cannot be received upon a question of damages, unless it is averred in the declaration that the goods were bought for that market."

Appeal from the Circuit Court for Escambia county.  
The facts of the case are stated in the opinion.

---

---

Merritt & Son v. Wittich—Argument of Counsel.

---

---

*John C. Avery and J. E. Yonge* for Appellants.

The first error assigned is that the court below rejected so much of Thomas Harrison's deposition as went to show the guaranty of the contract between Gilbert, Harrison & Co. and Carter, Tyner & Parker. The rejection of this testimony was clearly erroneous, because, when connected with testimony previously given, it made out a material breach of the contract sued on.

The guaranty of the contract sued on was that the timber was "of fair average quality." The guaranty of the contract between G., H. & Co. and C., T. & P. was that "the timber should be of the fair average quality of the season's shipments of pitch pine from Pensacola to Liverpool." These two guarantees are substantially identical, plaintiffs having shown by other witnesses that the fair average quality of timber from Pensacola to Liverpool was not different from the fair average quality of timber at Pensacola, and, if identical, then the testimony rejected was material and pertinent.

Plaintiffs did not derive any benefit from the admission of the statement that "on the arrival of the ship the witness himself examined the cargo as it was discharged, and at once decided that it was not of fair average quality of the season's shipments, but on the contrary was inferior." So far as the jury was advised, the "fair average quality" here mentioned might have had reference to shipments from Canada, or any other timber section, remote from Pensacola. They required the information which would have been afforded by the excluded testimony, to enable them to properly understand and apply to the case before them the testimony that was admitted.

The second error assigned is the rejection of the interrogatory addressed to, and the answer thereto, by Wilford Car-



---

---

Merritt & Son v. Wittich—Opinion of Court.

---

---

ter. It may be that it was immaterial in itself whether reclamation was or was not made by Carter, Tyner & Parker; and if the witness had been asked only whether such reclamation was made and allowed, then, possibly, the objection would have been plausible. But the interrogatory requires the witness to state further whether the amount of the reclamation was more or less than the true difference between the value of the timber delivered and the value of average shipments from Pensacola. Thus, in connection with the other testimony in the case, the whole interrogatory, and the answer to it, became relevant and proper.

But the evidence of amount of reclamation paid is itself admissible for the purpose of determining value. Such evidence shows that the price for which the timber sold was so much less than it would have been but for defect warranted against; and evidence of the price obtained on re-sale has been held admissible to prove value. Field on Dam., §§273 and 281, note; Reggio vs. Braggiotti, 7 Cush., 166; Foster vs. Rogers, 27 Ala., 602; Clare vs. Maynard, 6 A. & E., 519; Cox vs. Walker, id., 523.

Evidence of value at Liverpool is admissible because it appears that it was in contemplation of the parties, when the sale was made, that the timber was to be shipped to Liverpool for re-sale. Field on Dam., §§266 and 252; 40 N. Y., 422; Converse vs. Prettyman, 2 Minn., 229; Sedg. on Dam., 279, note (1); Hadley vs. Baxendale, 9 Exch., 341; Hadley vs. Baxendale, 26 Eng., L. & E., 398.

*W. A. Blount* for Appellee.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

L. M. Merritt and E. B. Merritt, merchants and part-

---

---

Merritt & Son v. Wittich—Opinion of Court.

---

---

ners under the name and firm of L. M. Merritt & Son, brought their action in assumpsit against W. L. Wittich to recover the sum of two thousand dollars for breach of contract, which contract or agreement is in the words and figures following:

“PENSACOLA, May 17, 1879.

“W. L. Wittich sells, and L. M. Merritt & Son purchase a cargo of p. pine, loaded on board of the British ship N. Mosher, say about one-half of hewn timber, averaging ninety cubic feet per log, and about one-half of sawn timber, averaging forty cubic feet per log, with timber for beam filling, and deals for stowage, timber guaranteed of the season’s manufacture, of fair average quality. The measurement guaranteed to overrun the specification. The price to be paid estimated upon the intake measurement and to be for beam fillings forty-five shillings for load of fifty cubic feet, for deals eight pounds ten shillings per standard of 165 cubic feet, and cargo fifty-three shillings per load of fifty cubic feet, less two and a half per cent. commissions, payable on signing bills of lading.

(Signed.)

W. L. WITTICH,

L. M. MERRITT & SON.

“Witness both signatures,

J. R. McGAUGHY.”

The defendant, for plea, said that he performed his contract, that the timber was of said season’s manufacture, of fair average quality, and did overrun the specifications.

The plaintiffs filed their replication and issue was joined.

The case was tried in January term, 1883, and the jury found for the defendant, and judgment was entered.

From this judgment the plaintiffs bring their appeal.

The errors assigned are:

First. The court below erred in sustaining the objection to the interrogatory addressed to Wilford Carter.

---

---

Merritt & Son v. Wittich—Opinion of Court.

---

---

Second. The court below erred in sustaining the objection to answer to interrogatory addressed to Thomas Harrison.

The record shows that the plaintiffs introduced witnesses who “testified, that the fair average quality of pitch pine timber at Pensacola was not different from the fair average quality of such timber at Pensacola in other seasons, and that the fair average quality of pitch pine shipments from Pensacola to Liverpool, in 1879, was not different from the fair average quality of shipments in other seasons, or to other ports, and that the fair average quality of such shipments from Pensacola to Liverpool was not different from the fair average quality of such timber at Pensacola, and that the timber in question was not of fair average quality of the season’s shipment of pitch pine timber from Pensacola to Liverpool”; and then and there by their attorneys, offered the deposition of Thos. Harrison, taken at Liverpool under a commission, and upon written interrogatories, in the course of which said deposition and in answer to the following interrogatory:

“State whether in the year 1879 you became the purchaser of a cargo, or part of a cargo of pitch pine timber shipped from Pensacola, Florida, United States of America, to Liverpool, on the British bark N. Mosher, by L. M. Merritt & Son, and if so, state what was the description and quality of said cargo. Was it, or was it not merchantable? Was it, or was it not of fair average quality of pitch pine shipments from Pensacola to Liverpool, in previous years? Please state whether the average quality of pitch pine shipments to Pensacola previous to 1879 were better or worse than the shipments of 1879?”

The said witness answered and said: “In the year 1879 his firm of Gilbert, Harrison Brothers purchased from Messrs. Carter, Tyner & Parker portions of the cargo of the

---

---

Merritt & Son v. Wittich—Opinion of Court.

---

---

N. Mosher; such purchases were made before the ship arrived, and upon a guarantee in the contract that the timber should be of the fair average quality of the season's shipments of pitch pine from Pensacola to Liverpool; on the arrival of the ship the witness, himself, examined the cargo as it was discharged, and at once decided that it was not of fair average quality of the season's shipments, but on the contrary was inferior. The inferiority was so great that the witness rejected the timber as a fulfillment of his contract, and refused to accept it, and the rejection was allowed by Messrs. Carter, Tyner & Parker. It could not be resisted." "But to the admission of said answer to said interrogatory the attorney for the said defendant did then and there object, because the guarantee of the contract in said answer mentioned was different from the guarantee of the contract mentioned in the declaration and the said Judge did then and there deliver his opinion and decide that the said objection ought to be allowed, and said answer ought not to be admitted in testimony," except the following: "In the year 1879, his firm of Gilbert, Harrison & Bros. purchased from Messrs. Carter, Tyner & Parker, portions of the cargo of the N. Mosher; such purchases were made before the ship arrived." And except the following: "On the arrival of the ship the witness, himself, examined the cargo as it was discharged, and at once decided that it was not of fair average quality of the season's shipments, but on the contrary was inferior." To which opinion and decision of said Judge said plaintiffs, by their attorneys, did then and there except.

It also appears by the record that the plaintiffs produced and offered the deposition of Wilford Carter, of Liverpool, taken under a commission upon written interrogatories; that he was one of the firm of "Tyner, Carter & Parker," who were the purchasers of the cargo of timber on the N.

---

---

Merritt & Son v. Wittich—Opinion of Court.

---

---

Mosher; that witness was required by the plaintiffs to answer the following interrogatory: "State whether any reclamation was made from L. M. Merritt & Son, in behalf of Messrs. Vaughn & Co., on account of said cargo not being of fair average quality of shipments of pitch pine timber from Pensacola, Florida, to Liverpool, and if so, state in what amount, and was the said reclamation paid? And was the amount of the said reclamation more or less than the true difference between the value of said timber and the value of average shipments from Pensacola, estimating also the deficiency in the measurement?"

The witness answered as follows: "Witness saith his firm claimed an allowance under the circumstances as stated in his answer to the last interrogatory. Negotiations in regard to the claim were conducted between his firm and Messrs. Merritt, by Mr. Smith, of the firm of James Smith & Co. In result, witness agreed to accept an allowance of £47 and £63, making together £110 from the contract price, and such amount was duly paid to the witness's firm. The witness has no hesitation in saying that the amount of the allowance was not more than the true difference between the value of the timber, and value of the average shipments from Pensacola, estimating also the deficiency in measurement."

To this interrogatory and answer the defendant's counsel duly objected, because the same was irrelevant and impertinent. The court sustained the objection, and decided that the answer should not be read to the jury. The plaintiffs duly excepted to the ruling of the court.

The contract in this case was made in Pensacola, and in it there is no reference as to the place of delivery of the timber by the ship. Wittich sells and Merritt & Son buy at Pensacola. The title there passes and the delivery is made. The declaration charges the same fact, to wit:

---

---

Merritt & Son v. Wittich—Opinion of Court.

---

---

“That on the 17th day of May, A. D. 1879, in the county aforesaid (Escambia county) the said defendant sold to L. M. Merritt & Son, the plaintiffs, a cargo of pitch pine loaded on board the British ship *N. Mosher*,” &c. There is no allegation that defendant knew that said timber was to be transported to Liverpool, or that it was to be there inspected. The defendant did not guarantee that the timber should be of the “fair average quality of pitch pine shipments from Pensacola to Liverpool in previous years.” The language of his contract is: “Timber guaranteed of ‘the season’s manufacture, of fair average quality.’ He did not guarantee ‘that the timber should be of the fair average quality of the season’s shipments of pitch pine from ‘Pensacola to Liverpool,’ as embodied in the answer to the interrogatory propounded to the witness Harrison. The quality was to be determined in the Pensacola market, and not Liverpool. The Liverpool market might have demanded a higher quality of timber than did the Pensacola market. It appears that the consignors at Liverpool, Carter, Tyner & Parker, had sold, by contract, to Gilbert, Harrison Bros. a portion of the cargo of the *N. Mosher*, to arrive, and had guaranteed in that contract ‘that the timber ‘should be of the fair average quality of the season’s shipment of pitch pine from *Pensacola to Liverpool*.’” The evidence of this witness, Harrison, was in reference to the contract so made with his firm and not with reference to the contract here declared on, which is essentially different from the one between Carter, Tyner & Parker and Gilbert, Harrison Bros. The evidence as to the quality of the timber in question should have been directed in reference to the Pensacola market, and not to that of some foreign port. It is true that the witness, E. B. Merritt, one of the plaintiffs, testifies in his own behalf “that the said timber in the said ‘declaration mentioned was purchased by the plaintiffs

---

---

Merritt & Son v. Wittich—Opinion of Court.

---

---

“from the defendant for re-sale at Liverpool, England, of  
“which the defendant at the time of said purchase had no-  
“tice, and that the said ship N. Mosher, on board of which  
“the said defendant contracted to and did deliver said tim-  
“ber, was under charter to said Wittich at the time of  
“said sale for some safe port in the United Kingdom, and  
“about the time of the said sale of timber in the declara-  
“tion mentioned, the defendant assigned said charter party  
to the plaintiffs.” None of these facts so sworn to appear  
in the contract, nor are they alleged in the declaration.  
This evidence does not, therefore, permit the testimony of  
Harrison to be introduced to show the quality of the tim-  
ber in Liverpool under the sub-contract with Carter, Tyner  
& Parker. It is evident the sale and delivery was fully  
consummated at Pensacola, and the breach of the contract,  
if there was one, was at same place. It must have been easy  
to ascertain the quality of the timber at Pensacola by the  
examination of witnesses who handled and shipped it at  
that port. No notice seems to have been given to the de-  
fendant on the arrival of the timber in Liverpool of the  
alleged failure of his guarantee, or of the sale at a reduced  
price of the same, until the commencement of this action.  
“If the contract or the conduct of the parties fixed a place  
“by the market rates of which the value is to be ascer-  
“tained, the evidence should be confined to the market  
“value at that place, and not extend to the value in other  
“markets.” Abbott’s Trial Evidence, 308.

The case of Cahen vs. Platt, 69 N. Y., 348, was an action  
brought to recover damages for the alleged breach of a con-  
tract of purchase and sale. In the city of New York plain-  
tiff sold to defendants certain boxes of glass, to be paid for  
in New York upon bills of lading, by bills of exchange on  
Antwerp. It was to be delivered on board of vessels at  
Antwerp, and to be thereafter at the risk of the defendants.

---

---

Merritt & Son v. Wittich—Opinion of Court.

---

---

In pursuance of the contract the plaintiff delivered a portion of the glass, for which they were paid. The defendants refused to receive any more, and the action was brought to recover damages consequent on such refusal. The court in their opinion say: "The contract was made in New York, "and it was doubtless contemplated by the parties that the "glass would be carried to New York. But the plaintiff "was not bound to deliver it there. His delivery was upon "ship board at Antwerp, and after the glass was shipped "the defendants could transport it to any port of the world. "It was then at their risk, and they were liable to pay for "it, although it should be lost." "The general measure "of damage in such a case is the difference between the con- "tract price and the market price at the time and place of "delivery." Bickett vs. Colton, 41 Miss., 368; Boier vs. Vincent, 24 Iowa, 387; Sleuter vs. Wallbaum, 45 Ill., 43; Gregory vs. McDowell, 8 Wend., 435; Clark vs. Pinney, 7 Cowen, 681; Shaw vs. Nudd, 8 Pick., 9.

"Upon a contract to deliver goods, the general rule of "damages for non-delivery is the market value of the goods "at the time and place of the promised delivery, if no "money has yet been paid by the vendee; but if the ven- "dee has already paid the price in advance he may recover "the highest price of such goods in the same place, at any "time between the stipulated day and the time of trial." 2 Greenleaf on Ev., 13 Ed., p. 252.

In Wait's Actions and Defences, Vol. 3, page 521, it is said: "The damages recoverable will be calculated as the "market value of the goods at the time and place when and "where they ought to have been delivered, and cites Lawrence vs. Knowles, 5 Bing., N. C., 399; s. c., 7 Scott, 181; York vs. VerPlanck, 65 Barb., 316. "And evidence of "the value of such goods in a foreign market cannot be "received upon the question of damages, unless it is averred



---

**Merritt & Son v. Wittich—Opinion of Court.**

---

“in the declaration that the goods were bought for that market,” and cites *Cofield vs. Clark*, 2 Col. T., 101.

Again, he says in Vol. 2, page 460: “Where the vendor “incurs liability to the vendee for the defective quality of “goods sold, whether his liability arises through fraud or “a breach of contract, the measure of damages is the difference in value at the time between goods corresponding “with the representations made, and those actually delivered.” *Likes vs. Baer*, 8 Iowa, 368.

In the case of *Converse vs. Burrows*, 2 Minn., 229, cited by counsel for appellants, the declaration alleged that the pork was to be furnished to the plaintiff for supplies at Fort Ridgley in the Territory of Minnesota, which plaintiff had contracted to supply, which fact was well-known to the defendant. In the case under consideration, neither the contract nor the declaration in any way indicate the intention of plaintiffs to export the timber, or the defendant to become liable for a breach of the guarantee at any place except Pensacola, where the sale and delivery took place.

If the court was correct in sustaining the objection to the answer to the interrogatory addressed to Harrison, it was also right in sustaining the objection to the answer of Carter. The amount of allowance of £110 from the contract price in Liverpool, was in no sense evidence of the difference in value of the timber as guaranteed in Pensacola, and its market value at Pensacola.

There was no error upon the part of the court and the judgment is affirmed.

---

Neal et al. v. Spooner et al.—Syllabus.

---

BENNETT F. NEAL ET AL., APPELLANTS, VS. JOSEPH H. SPOONER, ET AL., APPELLEES.

1. Under the plea of not guilty in ejectment special pleas under the statute of limitations should be struck out. Evidence to prove adverse possession, or an adverse title, may be given under the general issue.
2. The record of a deed is not proper evidence, if objected to, without proof of an original duly executed. The original is not *per se* evidence, but its execution must be proved by evidence other than the certificate of proof or acknowledgment for record.
3. A tax deed, purporting on its face to have been executed within five days after the sale by the collector, is void.
4. At the trial and before a cause is submitted to the jury, the proceedings may be amended by striking out the name of a plaintiff, and also by inserting the name of a next friend of a plaintiff who is shown to be a minor, under the sixth section of the Practice Act of 1861.
5. The omission of a next friend to give a bond to secure the proceeds of a judgment to be recovered cannot be assigned as error by the defendant on appeal. He is not injured or prejudiced, and it does not concern him.
6. A judgment in ejectment in favor of the plaintiff should state the quantity of the estate recovered. This is required by the statute of 1881; and a judgment which does not show what estate is recovered and to be delivered must be set aside and a proper judgment entered by the court, conformable to the verdict.

Appeal from the Circuit Court for Jackson county.

This was an action of ejectment commenced October 24, 1881, in the names of Joseph H. Spooner, Francis M. Spooner, Sarah J. Spooner and Mary E. Spooner, as plaintiffs, against the appellants, Bennett F. and Benjamin H. Neal, in Jackson county.

The defendants pleaded as follows:

1. That they are not guilty.
2. That they hold possession of the lands described by

---

**Neal et al. v. Spooner et al.—Statement of Case.**

---

virtue of a tax deed made to them on the 7th day of October, 1872, they having purchased the same at a tax sale made on the 2nd day of October, A. D., 1872, before the court-house door in Jackson county, by ———Revenue Collector in and for said county, and said deed was duly admitted to be recorded on the 4th day of June, A. D. 1875, in the record of deeds in and for said county, and defendants have been in the adverse possession of the same ever since under said deed.

3. That they have held adverse possession of said lands for more than seven years before the commencement of said action.

4. That since the purchase of said lands by defendants they have made valuable improvements upon the same to the value of \$350.00, and have paid the taxes upon the same ever since, amounting to sixty dollars.

5. The defendants for plea say, that they went into possession of said lands in good faith, believing that they had a good deed to the same by virtue of a purchase at a tax sale in 1872, and a deed made thereunder, and have remained in possession of them ever since, making valuable substantial improvements upon the same, amounting in the aggregate to at least \$350.00, and paid taxes to the amount of sixty dollars, which they desire may be allowed them in the event a judgment for possession should be rendered against them.

The plaintiffs joined issue on the first and fifth pleas, and moved to strike out the third and fourth pleas upon the ground that the said third plea is of matter not necessary to be specially pleaded, and that the fourth plea states nothing in defence of the action. The second and fifth pleas were demurred to as containing no ground of defence.

The motion to strike out the third and fourth pleas was

---

---

Neal et al. v. Spooner et al.—Statement of Case.

---

---

granted. Plaintiffs demurred to the second plea sustained. Demurrer to fifth plea overruled.

Plaintiffs at the trial showed title by patent in Benjamin Spooner, who died about the close of the war leaving his widow, Mary E. Spooner, and the other plaintiffs, their children, in possession of the land. In 1868 they removed to Georgia, leaving a tenant in possession. It was shown that Sarah J. Spooner was a minor at the time the suit was brought, and at the time of the trial.

Defendants offered in evidence a deed executed by the Clerk of the county, dated October 7, 1872, upon a sale by the Collector of Revenue, made October 7, 1872, (the date of the deed) for unpaid taxes, conveying the land to B. H. Neal. This was objected to, there being no proof of the execution of the deed, and the objection was sustained.

Defendants then offered the record book of the county, containing a record of the deed. This was objected to, the original deed being present and no proof offered of its due execution. . The objection was sustained and defendants excepted to the ruling. (The execution of this tax deed by the clerk was proved for record by one of the subscribing witnesses before the same clerk who executed it.)

B. H. Neal testified that he had been in possession of the land ever since 1872, when he bought it, and that he had made improvements on it. He also says that he bought the land at the tax sale for Mrs. Spooner, in his own name, and so wrote to her. The improvements were worth \$350, for building, clearing and fencing.

B. F. Neal testified that he also had been in possession since 1875, and had made improvements.

There is no testimony in the record showing whether any portion of the lands were enclosed or cultivated, or in what manner it had been occupied.

The jury, after being charged by the court, returned a

---

---

Neal et al. v. Spooner et al.—Opinion of Court.

---

---

verdict for the plaintiffs, upon which judgment was rendered against defendants. A motion for a new trial having been denied the defendants appealed.

*D. L. McKinnon* for Appellants.

*J. F. McClellan* for Appellees.

THE CHIEF JUSTICE delivered the opinion of the court.

I. The appellants assign for error the ruling of the court in sustaining the plaintiff's demurrer to the second plea, and in sustaining the plaintiff's motion to strike out the third and fourth pleas.

Upon examination of the second plea it is at once perceived that it sets up a claim of title and possession under a tax deed executed five days after the tax sale, whereas the statute forbade the execution of the deed until one year after the sale. The deed was, therefore, void upon its face. Besides this, this plea in terms alleges possession by defendants from June 4, 1875, less than seven years before the commencement of this suit. The plea further fails to set up the facts constituting an adverse possession or claim. The plea was, therefore, bad in substance and in law.

The third and fourth pleas were struck out, on motion, as being unnecessary and immaterial. If pleas of the statute of limitation or of adverse possession were proper, there is no fact alleged in these pleas which if proved would constitute a defence and they could not be sustained. They were properly struck out on motion.

In *Wade vs. Doyle*, 17 Fla., 522, 531, it was decided that under the plea of not guilty in ejectment, evidence to prove adverse possession is admissible, and a special plea of the statute of limitations should not be allowed and should be struck out.

---

---

Neal et al. v. Spooner et al.—Opinion of Court.

---

---

II. Error is assigned in that the court refused to admit the record of the tax deed in evidence without other proof. This ruling was right upon several grounds. (1) No proof was offered in connection with the record to show the genuineness of the deed, the record under the statute not being *per se* evidence of its execution. *Hogans vs. Carruth*, 18 Fla., 587. (2) This deed was void upon its face as already stated, its execution, at its date, being forbidden by statute.

III. Error is assigned in allowing appellees to amend their declaration by striking out the name of Mary E. Spooner, one of the plaintiffs, and in inserting after the name of Sarah E. Spooner, “a minor who sues by her next friend, Joseph H. Spooner,” after the testimony was closed.

The record recites that after the testimony was closed plaintiff’s counsel moved to amend the declaration by striking out the name of Mary E. Spooner as a plaintiff; also to insert after the name of Sarah J. Spooner the words, “a minor who sues by her next friend, Joseph H. Spooner,” which motion was opposed by defendants’ attorney and was granted by the court, to which the defendants excepted.

The act to amend the pleading and practice in the courts of this State, approved February 8, 1861, Chapter 1096, authorizes the Judge to exercise a large discretion in allowing amendments to pleadings and proceedings; and section 6 of that act (corresponding substantially to section 35 of the English Common Law Procedure Act of 1852) authorizes these amendments to be made by the Judge *at the trial* and before the verdict, when it shall appear that there has been a mis-joinder of plaintiffs, or that some person or persons not joined as plaintiffs ought to have been so joined, and the defendant shall not at or before the time of pleading have given notice that he objects thereto, if it shall appear to the Judge that the mis-joinder or non-joinder was not for the purpose of obtaining an undue advantage, &c. Such amendments

---

---

Neal et al. v. Spooner et al.—Opinion of Court.

---

---

are discretionary. See Day's Com. Law Pr., 4th Ed., 74, and decisions of the English courts cited under that section. In such cases this court will not interfere if the Judge do not plainly appear to have been wrong. *Sainsbury vs. Matthews*, 4 Meeson & Welsby, 347. And grave doubts exist as to the right or duty of the court to interfere with the exercise by the Judge presiding at the trial of the discretionary power vested in him. *Tennyson vs. O'Brien*, 5 Ellis & B., 497; *Milkin vs. Reed*, 15 C. B., 192.

There is no doubt that under the sixth section of the act of 1861 the Judge might, before the cause was submitted to the jury, as he did, allow the name of Mary E. Spooner to be struck out, as it appeared in evidence she had no title. It is equally clear that the name of the plaintiff, Sarah J. Spooner, she appearing to be a minor, might be struck out and again inserted "by her next friend" as a plaintiff. This was the effect of the action of the court. The issues as to the title of the land were not affected by the amendment allowed.

Mary E. Spooner was the widow of the former owner under whom the other plaintiffs claim title. That she may be entitled to dower in the land does not invest her with a title or make her a necessary or proper party in ejectment. The legal title was in the heirs at law.

As to Sarah J. Spooner she was under the age of twenty-one years when the suit was brought and no next friend had been appointed, but a next friend was appointed by the action of the court before the trial concluded and no motion had been made by defendants to set aside the proceedings or to dismiss the suit as to her. This was sufficient. *Fitch vs. Fitch*, 18 Wend., 513.

It is objected further that no bond had been given by the next friend as required by section 32, act of November 23, 1828, conditioned to secure the money to be "recovered to

---

---

Neal et al. v. Spooner et al.—Opinion of Court.

---

---

the use of the infant.” The defendants, however, made no motion on account of the omission to give bond, and indeed it was no concern of the defendants that a bond had not been given. The bond is required only for the protection of the minor in the event of a recovery of money.

IV. An error is assigned in that the Judge added a qualification to an instruction prayed by the defendants, in other words, that the Judge refused to give it as requested. No objection or exception having been taken to this action of the Judge, it cannot be urged as error on appeal. *Meinhard vs. Lilienthal*, 17 Fla., 501; *Burroughs vs. State*, id., 643; *So. Ex. Co. vs. VanMeter*, id., 783; *Stewart vs. Mills*, 18 Fla., 57; *Wilson vs. Marks*, id., 322.

V. It is further assigned for error that the court erred in not stating in the judgment the “quantity of the estate” the plaintiffs had in hand.

The judgment reads as follows: “Wherefore it is considered by the court that the plaintiffs do recover of the said defendants the said lands in controversy, to wit:” (describing the land) “and that a writ of possession do issue therefor; and that the plaintiffs do recover of the said defendants the sum of one cent together with their costs,” &c.

Section 2 of Chapter 3244, Laws of 1881, (McC’s Dig., 481,) requires that “the judgment awarding possession shall state the quantity of the estate and give description of the land recovered.”

The judgment here fails to state the quantity of the estate, whether in fee or for a term, whether of the entire or an undivided interest, or otherwise showing by the judgment of the court what interest is recovered and to be delivered.

While we find no error in the record sufficient to require a new trial, yet because of the want of a proper judgment



---

---

Horne v. Carter's Adm'rs—Syllabus.

---

---

as required by the statute, the judgment here entered must be set aside.

Therefore it is considered and adjudged that the final judgment rendered in this cause by the Circuit Court for the county of Jackson be vacated, and set aside, and the cause is remanded with directions that a proper judgment be entered in accordance with the verdict and pursuant to the statute.

---

TURNER HORNE, APPELLANT, VS. CARTER'S ADMINISTRATORS, APPELLEES.

1. Under the plea of not guilty in an action of ejectment, the defendant may prove an adverse possession. Chapter 3244, Laws of 1881, does not change the rule in this respect. It provides only that if the defendant wishes to *deny* possession of the premises, or wishes to *deny* that he claims adversely to the plaintiff, or to his title, it must be done by special plea.
2. A plea claiming to be a plea "on equitable grounds," but which sets up no fact upon which the defendant, if judgment was obtained against him, would be entitled to relief against it, may be stricken out on motion, or by sustaining a demurrer.
3. A plaintiff in ejectment is bound by the allegations in his declaration, and can recover possession of no greater quantity of land than he claims. He may, under certain circumstances, recover a lesser estate, interest or quantity, but never a greater.
4. It is not error for the court to refuse to give an instruction to the jury, requested by defendant's attorney, as to the adverse possession claimed by the defendant, unless there is embodied in such request a submission to the jury as to the fact whether such adverse possession had continued for the statutory period of seven years.
5. The appellant is responsible for the correctness of the record sent up to this court. When such record does not furnish the evidence or facts upon which alleged errors are based, this court will conclude that the rulings of the court below were in conformity to the law.

---

---

Horne v. Carter's Adm'rs—Opinion of Court.

---

---

6. There is no error in refusing to admit improper and hearsay evidence: but there is error in refusing to strike out such evidence when the same has been improperly admitted.
7. An adverse possession may, after the lapse of the statutory period, confer a possessory title which is good even as against the former owner. To constitute an adverse possession, it is not necessary that there should be a rightful title in the party setting up the defence. The idea of right is excluded by the very fact of the defence.
8. "A claim of title is efficacious as a ground of title by adverse possession; and neither a deed, nor any equivalent muniment of title is necessary for that purpose, when there is an actual occupation, with an old claim of exclusive title, or other circumstances by which the absolute owner is ordinarily distinguished from the naked possessor."

Appeal from the Circuit Court for Jackson county.

The facts of the case are stated in the opinion.

*D. L. McKinnon* for Appellant.

*J. F. McClellan* for Appellees.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an action of ejectment brought by James H. Richardson and Jacob H. Stephens, Administrators of the estate of Francis M. G. Carter, deceased, against Turner Horne. The declaration alleges that the defendant is in possession of a certain tract of land in the county of Jackson, described as follows: "The west half of southwest quarter of section twenty-one, township five, range ten, north and west, less five acres, including the Carter mill, containing about seventy-five acres." The plaintiffs claim title to the said lands and mesne damages to the amount of one hundred dollars per year.

The defendant plead as follows:

---

---

Horne v. Carter's Adm'rs—Opinion of Court.

---

---

I. That he is not guilty.

II. That he has been in adverse possession of the lands described for more than seven years before the commencement of this suit.

III. For equitable plea, that this defendant is the son of one Toney Horne, who purchased the land in the declaration mentioned about ten or eleven years ago, and inasmuch as he was growing old and decrepit and unable to till the land, he induced this defendant, who was then living some distance from his said father, to break up his home, where he was doing very well, and come and accept as a gift from him the said land, where defendant could live and assist him in his declining years, he being now about seventy-nine or eighty years old; that defendant, eight or nine years ago accepted the gift of land from his said father and immediately went into possession of said land and has remained continually in possession of it ever since, and has made some valuable, substantial improvements on the same, worth not less than two hundred dollars. But being ignorant and illiterate he failed to take a deed from his father to the land, both of them supposing that it was unnecessary, as defendant was in actual possession of the land, and that the verbal gift was sufficient; that although there was no stipulated price to be paid for the land, nevertheless the defendant, in consequence of the gift, has given his said father more than the land would have brought at the time, and, indeed, considers that he has fully paid for the same; that his said father was not in possession of said land at the time of the purchase of the same by the plaintiffs under an execution against his said father.

The plaintiffs joined issue as to the first plea; moved to strike out the second plea, and demurred to the third plea.

The court struck out the second plea, and sustained the

---

---

Horne v. Carter's Adm'rs—Opinion of Court.

---

---

demurrer to the third plea. The defendant duly excepted to such orders of the court.

At the June term, A. D. 1882, the cause came on to be tried by a jury who rendered a verdict as follows: "We, the jury, find that the plaintiffs have a fee simple title to the west half of the southwest quarter of section twenty-one, township five, range ten, north and west, and assess the damages one cent." Judgment was entered in favor of plaintiffs in the language of the verdict.

The attorney for the defendant moved for a new trial, which was denied by the court, and the defendant excepted to such ruling of the court.

The defendant brings his appeal from this judgment and assigns the following errors:

1. The court erred in granting the motion to strike out the second plea and in sustaining demurrer to the third plea.

2. The verdict of the jury and the judgment of the court gave to the plaintiffs five acres more land than was claimed by the plaintiffs in their pleadings.

3. In refusing to give special instructions one and four asked by the defendant.

4. In overruling defendant's objection to the introduction of the tax books of 1872 to prove that there was a warrant and sale.

5. In refusing to permit A. Merritt to answer the two last questions asked by defendant's attorney.

6. In overruling the objections of defendant's counsel to the questions asked George A. Baltzell, a witness for plaintiffs, in rebuttal as to what Toney and B. Horne said.

7. In refusing to rule out the evidence of L. M. Gamble in rebuttal.

8. In refusing to permit defendant to introduce Toney Horne and Bynum Horne in rebuttal of G. A. Baltzell and L. M. Gamble.

---

---

Horne v. Carter's Adm'rs—Opinion of Court.

---

---

9. In charging the law to the jury in the general charge in stating that there could be no adverse possession against him who held the legal written title, and that there "could be no title to land except by a written deed given by the party selling or giving to the party buying or accepting, &c."

10. In refusing to grant defendant's motion for a new trial, and to give general charges of defendant as requested.

The court granted the motion to strike out the second plea, and sustained the demurrer to the third plea. The statute as passed by the Legislature in 1881 (McC. Dig., 481, §6,) reads as follows: "The plea of not guilty in ejectment shall be held to admit the possession of the defendant, or in case of an adverse claimant, the adverse claim of the defendant. Should defendant wish to deny possession, or that he claims adversely, it shall be done by special plea." In this case the only plea necessary was that of not guilty. In actions of ejectment the question to be tried is that of title and right of possession, and the first plea of the defendant in this case put those questions in issue. The evidence admitted on the trial was pointed to the very issues tried to be made by the second and third pleas of the defendant. The court did not err in striking out the second plea and in sustaining the demurrer to the third plea. In *Wade et al. vs. Doyle*, 17 Fla., 522, this court in its opinion says: "Under the plea of not guilty, evidence to prove adverse possession is admissible, though the statute of limitation is not pleaded." 94 U. S., 775. Special pleas of this character were not admissible at common law, and the statute does not make them so. As remarked by the Supreme Court of Pennsylvania, in *Zeigler vs. Fisher*, 3 Penn. State, 367, when treating of a like statute to ours: "The act declares that the plea in ejectment shall be 'not guilty,' thereby reducing the issue to one

---

---

Horne v. Carter's Adm'rs—Opinion of Court.

---

---

“simple plea adapted to the trial of the merits with more facility and certainty.” Weiskoph vs. Dibble, 18 Fla., 23.

The statute of 1881 above cited does not change the law in this respect. It provides simply that if the defendant wishes to *deny* possession of the premises claimed by the plaintiff, or wishes to *deny* that he claims adversely to the plaintiff or his title it shall be done by special plea.

Counsel for the defendant in his argument insists it was error in the court to sustain the demurrer to the third plea for the reason that if the plea was an improper one, it could not be reached by demurrer, but only on motion to strike out, and cites §72 of the pleading and practice act. Chapter 1096 Laws. It is immaterial whether such plea is struck out on motion or on demurrer. It is not what it purports to be, “a plea on equitable grounds.” It sets up no fact upon which the defendant, if judgment were obtained against him, would be entitled to relief against it.

The second assigned error, that the judgment of the court gave to plaintiff more land than is claimed in the pleadings, is well taken. The plaintiffs in their declaration claim to recover “the west half of southwest quarter of section twenty-one, township five, range ten, north and west, *less five acres including the Carter mill*, containing about “75 acres.” The verdict of the jury is as follows: “We, the jury, find that the plaintiffs have a fee simple title to “the west half of the southwest quarter of section twenty-one, township five, range ten, north and west, and assess “the damages one cent.” The judgment as entered follows in the language of the verdict, and does not except from the effect of the judgment “five acres including the Carter mill.”

There is here a variance between the declaration and the judgment, the judgment being for a greater quantity of land than is claimed in the declaration. It is a well settled rule

---

---

Horne v. Carter's Adm'rs—Opinion of Court.

---

---

that a party is bound by the allegations in his declaration, and that he can recover no greater quantity, or a different estate from that which he has alleged in his declaration. The judgment must follow the complaint, and when that clearly states the interest or estate claimed by the plaintiff, he cannot recover a greater interest or estate. He may, under certain circumstances, recover a lesser estate, interest or quantity of land, but never a greater interest or a larger quantity. *Ballance vs. Rankin*, 12 Ill., 420; *Winstanley vs. Meacham*, 58 Ill., 97; 3 *Wait's Actions and Defences*, 122; *Tyler on Ejectment*, 580, and cases cited.

The third error assigned is in the courts refusing to charge the jury as asked for by defendant, as numbered one and four. The request so made by defendant of the court is as follows: "One. If you believe from the evidence that the defendant, Turner Horne, was in possession of the land, holding adversely to Toney Horne, that is, was holding possession of the land as his own, under a verbal gift from Toney Horne, then it was not subject to the execution under which it was sold, and the plaintiffs cannot recover it from him." The court charged as requested except that it struck out the words: "that is, was holding possession of the land as his own under a verbal gift from Toney Horne," and by adding as a qualification these words: "such possession in case of being supported by deed or other colorable title was different from possession without color of title, in which latter case only the lands actually occupied and enclosed are protected by seven years' possession."

The request on part of defendant, numbered four, was as follows: "If you believe from the evidence that Toney Horne was not in possession of the land, and Turner Horne held it adversely to him at the rendition of this judgment in April, 1881, then the plaintiffs cannot re-

---

---

Horne v. Carter's Adm'rs—Opinion of Court.

---

---

cover.” The court charged as requested, adding these words thereto: “That deed carried possession except against “actual adverse possession.”

The statute of this State, Chapter 1869, Laws of 1872, §7, provides as follows: “When it shall appear that there “has been an actual, continued occupation of premises under a claim of title, exclusive of any other right, but “not founded upon a written instrument or a judgment or “decree, the premises so actually occupied, and no other, “shall be deemed to be held adversely.” And further to determine what premises shall be declared to have been so held adversely, the eighth section of the same act provides that: “For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment or decree, land shall be deemed “to have been possessed and occupied in the following “cases only: First. Where it has been protected by a substantial enclosure; or second, where it has been usually “cultivated or improved.”

The result of the action of the court was a refusal to give the charge *as requested*. Was the instruction correct *as requested*? We think not, because it would charge, that if Turner Horne was in possession, holding adversely to Toney Horne, and as his own property, it was not subject to the execution; whereas, the statute requires such adverse holding for the period of seven years before the suit. The court, therefore, properly refused to give it. The change made in the instruction so asked to be given, made it the instruction of the court. Such addition made by the court was incorrect in this, that it would exempt under claim of adverse possession only such lands as were occupied and enclosed, not such as were “protected by a substantial enclosure,” or “when it had been usually cultiva-



---

---

Horne v. Carter's Adm'rs—Opinion of Court.

---

---

ter or improved.” The addition or qualification should have been in accordance with the law above cited.

The request, numbered *four*, was in like manner refused, the court not giving it as requested. It was properly refused because it instructed the jury that the plaintiff could not recover if Toney Horne was not in possession, and Turner Horne was in possession, holding adversely to Toney at the rendition of the judgment in 1881, though seven years of such adverse possession had not elapsed. The words added to the instruction by the court cannot be good ground of exception by the appellant.

The fourth error assigned is in overruling defendant's objection to the introduction of the tax books of 1872. It is questionable whether this proof was material, the tax deed having been given in evidence without objection, but if it was so material the tax book's warrant, and the proof of sale under such warrant as embodied in the book, are not before this court. They are not in the record, nor in any manner made a part of it. The appellant is responsible for his record, and when such evidence is not properly furnished this court will conclude that the rulings of the court below are in conformity to the law.

The fifth error assigned is in refusing to permit witness, A. M. Merritt, to answer the following questions, asked by the defendant's attorney:

Did you have any conversation with Turner Horne in 1873 or 1874, about who the land in question belonged to?

Did you hear Toney Horne say in 1873 or 1874, whether or not he had given the land to defendant?

There was no error in the courts refusing to permit the witness to answer the questions, as asked by the defendant's attorney. The answers would have been simply hearsay, were in no way proper to be given, and could not affect the title to the land. Facts showing the use and occupation of

---

---

Horne v. Carter's Adm'rs—Opinion of Court.

---

---

the land by the possessor would be the best proof of actual possession.

The sixth error assigned is in overruling objections of defendant's attorney to questions asked George A. Baltzell, witness for plaintiff, as follows: "State anything you may have heard either Toney Horne or Bynum Horne say about the defendant paying rent to Toney Horne for the land in question." Defendant's attorney objected to this answer on the grounds:

First. It would be hearsay evidence.

Second. No predicate was laid for asking the question or contradicting Toney and Bynum Horne.

Third. Because Turner Horne was not present at the time.

The fact of the payment of rent by Turner Horne was competent to be proven in the usual way. No question as to such payment had been propounded by plaintiff's attorney to either Toney Horne or Bynum Horne, and no evidence had been introduced to that fact. Both Toney Horne and Bynum Horne had been introduced as witnesses and their evidence appears in the record. Toney Horne swears that he "never rented it (the land) to defendant, nor has he ever paid me rent for it." Bynum Horne testified "that the defendant had never paid Toney Horne any rent for the land." The attention of these witnesses, or either of them, was not called to any conversation had with George A. Baltzell or any other person at Carter's mill some time after the sale of the land in question. Previous to the asking of the question to Baltzell by the plaintiff's attorney, Baltzell had testified "that he had a conversation with Toney Horne and Bynum Horne at what is known as Carter's mill, some time after the sale of the land in question, but Turner Horne, the defendant, was not present." The evidence so offered and introduced by the plaintiffs' attorney

---

---

Horne v. Carter's Adm'rs—Opinion of Court.

---

---

was clearly incompetent under the rules of law and should have been excluded. If the object was to impeach the evidence of Toney and Bynum Horne, their attention should have been first called to the time and place of such conversation and the person or persons with whom it was had. As it was introduced it was simple hearsay evidence and could not in any event bind the defendant, Turner Horne, who was not present, either to assent or dissent from the statement.

The seventh error assigned is that the court refused to strike out the evidence of L. M. Gamble in rebuttal. Gamble testified that he had a conversation with Toney Horne in 1879, in which Toney spoke of the land in question as his, "and that somebody, I believe Mr. Carter, was trying to take it away from him. Toney said Carter had a mortgage on the Carter mill tract, and might take that away, but he could not take away the land Turner lived on; that he, Toney, had the deeds to that land and claimed it as a homestead, and asked me if he could not homestead it."

Previous to this evidence of Gamble, the defendant proved by Judge Baltzell, County Judge, that he made out an exemption homestead in Toney Horne's name to the land in question and gave them a certificate of it, before the sale on execution against Toney Horne. It was also proved that the sale of said land upon execution against Toney Horne was forbidden by the attorney of Toney Horne, on the ground that it was his homestead, and that the same was recorded in the County Judge's office as his homestead, and that a certificate from the County Judge to that effect was shown to the sheriff. The evidence of Gamble was improperly admitted, being hearsay, and there was error in refusing to strike it out.

---

---

Horne v. Carter's Adm'rs—Opinion of Court.

---

---

Turner Horne is in no manner connected with the conversation with Toney Horne.

It is unnecessary under the views expressed to consider the eighth ground of error.

The ninth error assigned relates to the charge of the court "in stating that there could be no adverse possession against him who held the legal written title, and that there could be no title to land except by a written deed given by the party selling or giving to the party buying or accepting," &c.

This charge is evidently erroneous. An adverse possession may, after the lapse of the necessary time, confer a possessory title, which is good even against the previous owner. To constitute an adverse possession it is not necessary that there should be a rightful title in the party setting up the defence; the idea of right is excluded by the very fact of the defence. In Tyler on Ejectment, page 887, it is said: "It is wholly immaterial whether the claim upon which an adverse possession is founded is made upon a valid or void instrument; nor indeed is it necessary, except in cases of constructive occupancy, that the claim should be founded upon any written instrument whatever. But the possession must be under a claim of the entire title, and the same must be in open hostility to the true title." Harpending vs. Ref'd Dutch Church, 16 Peters, 455; Humbert vs. Trinity Church, 24 Wend., 587; Kent vs. Harcourt, 33 Barb., 491.

A claim of title is efficacious as a ground of title by adverse possession, and neither a deed nor any equivalent muniment of title is necessary for that purpose, where there is an actual occupation, with an oral claim of exclusive title, or other circumstances by which the absolute owner is ordinarily distinguished from the naked possessor. 3 Waitt Actions and Defences, 19; Sands vs. Hughes, 53 N. Y., 287 ;

---

---

Horne v. Carter's Adm'rs—Opinion of Court.

---

---

Jackson *ex dem.* Young vs. Ellis & White, 13 John., 118 ;  
La Frombois vs. Smith, 8 Cow., 589.

The case of Comins vs. Comins, 21 Conn., 413, was, in some respects, like that under consideration. The plaintiff claimed to recover possession of a barn yard and buildings thereon, claiming title as executor of Josiah Comins, who had formerly owned the premises. The defendant claimed that Josiah Comins, his father, had given the barn and yard to him, the defendant, to induce him to remain and not to remove out of the State. That he immediately took possession of the premises and used and occupied them as his own for a period of more than fifteen years, and claimed that such use was a bar to plaintiff's recovery. The court in its opinion says: "It is the claim of title with which a possession is accompanied, which shows that the possessor occupied the land as his own, and not as tenant, or recognizing the title of another, and for that reason such possession is adverse. \* \* \* \* It would have been sufficient in this case for the defendant to show that he was in possession of the premises for the period of fifteen years, under such claim of title, or as his own, without adducing any grant, or other color of title under which he claimed to hold. \* \* \* \* We cannot perceive how an entry and possession under a claim of title in himself by virtue of a void grant," (*under the Statute of Frauds of Connecticut*) "whether by parol or deed, is less adverse than if taken and held without any color of title whatever; there is the same possession under a claim of title, and the same destitution of a regular valid title in both cases."

For the reasons assigned in this opinion the judgment must be reversed and a new trial awarded.

Judgment reversed.

---

---

Hart's Executor v. Smith—Statement of Case.

---

---

HART'S EXECUTOR. PLAINTIFF IN ERROR. VS. CHANDLER H.  
SMITH, DEFENDANT IN ERROR.

1. The power of the court under the statute to allow amendments applies to the amendment of a petition for the re-establishment of lost papers.
2. After a cause is remanded by the Supreme Court to the Circuit Court for further proceedings, such court has power to admit amendments to be made to the pleadings and proceedings, unless the Supreme Court otherwise directs.
3. When a party has by pleadings waived an objection which might have been taken it is too late after action of the court upon such pleading to withdraw it for the purpose of raising the objection so waived.
4. An executor of an executor is the executor of the will of the first testator, unless he shall at the time of qualifying renounce and refuse to administer under the will of the first testator.
5. After notice to the executor of an executor, of a petition praying the re-establishment of a lost writ of *fi. fa.* upon a judgment against the first executor, the last executor cannot have the petition dismissed on the ground that he has since the notice renounced administration under the will of the first testator.

Writ of error to the Circuit Court for Leon county to which the case was transferred from Madison county.

This was a proceeding commenced by petition under the provisions of an act relating to the re-establishment of lost papers, Chapter 3019, Laws of 1877, the object of which was to re-establish a writ of *fi. fa.* issued upon a judgment in favor of respondent against Penelope Hart, Executrix, and Edwin A. Hart, Executor of the will of James L. Hart, deceased. The writ of *fi. fa.* was destroyed by fire before it was executed or satisfied. Notice of the application was served on "Wilson C. McCall, executor of Penelope Hart deceased, and as such, executor of James L. Hart, deceased." The petition did not show that either

---

---

**Hart's Executor v. Smith—Statement of Case.**

---

---

Penelope or Edwin A. Hart was dead, and the court allowed petitioner to amend by averring that Penelope was dead, and by her last will and testament had appointed McCall her executor, and that McCall is executor of the estate of James L. Hart, deceased, by virtue of his appointment as executor of the will of Penelope Hart.

McCall admits that he is the executor of the will of Penelope, but denies that he has ever administered the goods, &c., of the estate of James L. Hart, deceased, or ever intermeddled therewith. He further, by an amended answer, reiterates that he has never intermeddled with the goods, &c., of the estate of James L. Hart, deceased, or administered the same, and that he had filed in the Probate office a renunciation of any right and all intention to act or become the executor of the estate of James L. Hart, deceased. This renunciation appears to have been filed after the filing and notice of this petition.

On the 17th of January, 1880, upon due notice and hearing, the court made an order re-establishing the writ of *fi. fa.*, and upon this order McCall sued out a writ of error, and at June term, 1880, of this court, the order was reversed and the cause remanded for further proceedings, upon the ground that it did not appear that Edwin A. Hart had died, and if living he was the surviving executor of the will of James L. Hart, and McCall, as executor of the will of Penelope, was not charged with administration of the estate of James L. Hart. See *Hart's Executor vs. Smith*, 17 Fla., 767.

Upon the cause being remanded, upon due notice and hearing the court allowed petitioner to amend his petition by an averment that Penelope and Edwin A. Hart had both died, and Edwin A. had died before the death of Penelope; that Penelope left her last will and testament appointing W. C. McCall as her executor, and that Penelope

---

---

Hart's Executor v. Smith—Statement of Case.

---

---

was the only surviving heir and residuary legatee of James L. Hart, her husband, and that she left no children.

September 6, 1880, McCall filed an amended answer affirming his previous answer and says "that he has in no manner intermeddled with the estate of James L. Hart ; "that he has not administered the goods and chattels, lands "and credits thereof, and is not the executor of James L. "Hart, deceased, and as the executor of Penelope Hart, deceased, has long since, before the making of said amendments, filed in the office of the County Judge of Madison county, State of Florida, a renunciation renouncing all "right to act or become the executor of James L. Hart, deceased, which has been accepted and filed by the County "Judge of said county of Madison."

Petitioner demurred to this answer on the ground that having been duly appointed and qualified as executor of the will of Penelope Hart, she being the sole surviving executrix of James L. Hart, McCall was precluded from renouncing administration of the estate of James L.; and that he could not so renounce after this proceeding had been commenced against him as such executor of the will of Penelope, he having entered upon administration as such executor.

The court sustained the demurrer and, "no further pleadings being offered," ordered that the copy of the execution annexed to the petition be established "against Wilson C. "McCall, as executor of Penelope Hart, and as such executor of James L. Hart, deceased, and that the same be of "the same validity as the original."

This order is now brought up by writ of error for a review of the proceedings.

*W. C. McCall* and *H. J. McCall* for Plaintiff in Error.

*C. W. Stevens* for Defendant in Error.



---

**Hart's Executor v. Smith—Opinion of Court.**

---

**THE CHIEF JUSTICE** delivered the opinion of the court.

Plaintiff in error contends that there was error in allowing the petitioner to amend his petition so as to show the death of Edwin A. Hart, after the return and entry of the mandate of the Supreme Court, "there being no case in court."

The Supreme Court, it is observed, merely reversed the order of the Circuit Court and remanded the cause for the further proceedings according to the law and practice. The defect appeared to be the want of a certain allegation in the petition. This court did not dismiss the petition nor order it to be dismissed. The case went back to stand as though no final order or judgment had been entered, and the matter still pending on the prayer of the petition and the answer.

After a cause is remanded to the inferior court, such court may receive additional pleadings or admit amendments to those already filed, even after the Appellate Court has decided such pleas to be bad on demurrer, unless the Appellate Court otherwise directs. *The Marine Ins. Co. vs. Hodgson*, 6 Cranch, 206; *The U. S. vs. Boyd*, 15 Peters, 187, 209.

The amendment was as clearly within the power of the court as though the Circuit Court itself had held the pleading defective for want of a necessary allegation. The statute relates to amendments of "defects in any proceeding in civil causes." Act of February 8, 1861.

The second error assigned is that the court refused to allow an amended answer to be withdrawn for the purpose of moving to vacate an order allowing a rehearing and amendment of the petition.

There is no substance in this suggestion. The respondent having waived objection to an amendment of the petition

---

---

Hart's Executor v. Smith—Opinion of Court.

---

---

by pleading to it should not trifle with the patience of the court by thus withdrawing his waiver. The court had the power to allow the amendment and properly exercised it.

The third error alleged is the order sustaining petitioner's demurrer to respondent's amended answer.

The answer demurred to averred that respondent had not intermeddled or administered the effects of the estate of James L. Hart, deceased, and was not his executor, and that "before the amendment," he had, as the executor of Penelope Hart, deceased, filed in the Probate office a renunciation of all right to act or become the executor of said James L. Hart, deceased, which renunciation had been accepted and filed by the County Judge.

The rule as laid down in the books, in the absence of a statute changing it, is, that if there be a sole executor of A., the executor such executor is, to all intents and purposes, the executor and representative of the first testator. 1 Williams on Ex., 6 Am. Ed., 293, [254.]

In Worth vs. McAden, 1 Dev. & Batt. Eq., 199, 209, it is said that "where one who is the sole executor of another, dies after making a will and appointing executors, those so appointed may accept the office of executor to their immediate testator, and renounce the office of executor to his testator; but if they prove the will of their immediate testator generally, without such a renunciation, they become executors also of the first testator."

It seems to be the uniform rule that so long as the chain of representation remains unbroken by any intestacy, the ultimate executor is the representative of every preceding testator. 1 Wms. Ex., 294, [255.]

McCall admits what is alleged in the petition that he was acting as executor of the will of Penelope Hart, deceased, at the time the notice was served upon him in this proceeding, and says that "before making the amendment" he filed his

---

---

**Hart's Executor v. Smith—Opinion of Court.**

---

---

renunciation of the executorship under the will of James L. Hart, deceased. Whatever effect this renunciation may have, if any, toward relieving him of such administration, it is certain that when he qualified as executor under the will of Penelope Hart he became (not having renounced it at the time of so qualifying) the executor of the will of James L. Hart, and was such executor at the time of the inception of these proceedings. This was sufficient to authorize the court to act and to bind the estate by its judgment, and no act of the executor could divest the court of its power in the premises.

The fourth error assigned is, that there was no evidence before the court showing that Edwin A. and Penelope Hart were the executor and executrix of the will of James L. Hart, deceased.

The first allegation in the petition is that petitioner had recovered a judgment against them as such executor and executrix. We cannot conceive that it is necessary to prove here what must have been proved before the court when the judgment was rendered against them.

All the facts necessary to warrant the order of the court re-establishing the execution are stated in the petition and proceedings before the court, and none of them are denied by the respondent, McCall, who appeared, after due notice, at every step in the case contesting and opposing the petitioner. He must be held to the ordinary rule, that what is not denied is admitted to be true.

We find no error in the judgment of the Circuit Court, and it is affirmed with costs.

---

Coffee v. Groover et al.—Syllabus.

---

ANDREW J. COFFEE, PLAINTIFF IN ERROR, VS. JAMES M  
GROOVER ET AL., DEFENDANTS IN ERROR.

1. A former adjudication of the cause of action is not proper ground for a motion to dismiss, but is matter of defence.
2. In ejectment all matters of legal defence (excepting special denials of possession and denials of adverse claim under the statute) may be given in evidence under the plea of not guilty. Special pleas of matter affecting the legal title or in estoppel should be struck out. A judgment sustaining a demurrer to such pleas will not preclude proof at the trial of the facts pleaded.
3. Grants of land by a government *de facto* of parts of a disputed territory in its possession are valid against the State which may be ultimately found to have the right, and the rights of the inhabitants to property acquired in good faith from the *de facto* government, are respected. Re-affirming *Groover vs. Coffee*, 1 Fla., 61.
4. When a doubtful or disputed boundary is settled by agreement between States and duly ratified, such agreement does not operate retrospectively so as to disturb titles to property.
5. When a deed does not locate the land described as being in a given county or State, oral testimony is competent to identify the premises as to location and boundaries.
6. A certified copy of a will as "a true copy from the records of the office," without any mention that the will had been duly proved or admitted to probate and containing no copy of the probate record of the proper tribunal is not legal evidence.
7. When a jury brought into a court a verdict in ejectment, in favor of the plaintiffs generally and for damages, and, before the verdict is entered in the record, the court instructed them to bring in a verdict in the form required by law, and directed that a proper form be prepared, which being done the jury retired and brought in their verdict in legal form, signed by their foreman, upon which judgment is entered, there is no error in the proceeding. A jury may vary or correct a verdict before they are discharged and before it is recorded, and a form of verdict prepared under the direction of the court, assented to by the jury, is sufficient.
8. A suit in ejectment is brought by seven plaintiffs, brothers and sisters, and one of them before trial dies unmarried and no exec

---

---

Coffee v. Groover et al.—Argument of Counsel.

---

---

tor or administrator is appointed, the remaining co-plaintiffs and her mother being her heirs at law inheriting equally her undivided one-seventh of the land. The mother inheriting one-seventh of the share of the deceased, to wit: one forty-ninth, and she not being a party plaintiff, the right of action for such mother's share does not survive to the six brothers and sisters; but the right of action for the entire residue of the land, to-wit: forty-eight forty-ninths, does survive to the remaining plaintiffs, under the laws of this State and the rules of the Circuit Court. McClellan's Dig., 829, Sec. 73; C. C. Rules, 87.

Writ of Error to the Circuit Court for Jefferson county, to which the case was transferred from Madison county.

The facts of the case are stated in the opinion.

*Angus Paterson* for Plaintiff in Error.

In the year A. D. 1874 the plaintiff in error brought an action of ejectment against Mary J. Groover as executrix of the last will and testament of Charles E. Groover, deceased, in Madison Circuit court; the said case was, on the application of the said executrix, transferred to the United States Court at Tallahassee, and the verdict and judgment of that court was against her, and the said Andrew J. Coffee went into possession of the land in controversy under said judgment.

And afterwards, to wit: The defendants in error brought this suit in Madison Circuit Court, being the heirs of Charles E. Groover, and the case was transferred to Jefferson county and tried there at the Spring term of said court, A. D. 1883. To review that judgment this writ of error is sued out.

The matter of the former trial was brought to the attention of the court by a motion to dismiss, and also by a plea to the jurisdiction and *res adjudicata*, which were overruled on the ground that the executrix was not a party nor

---

---

*Coffee v. Groover et al.—Argument of Counsel.*

---

---

privy with the heirs. We take the position that the executrix is a privy, and that a suit by or against the executrix binds the heirs under our statute. *Thomp. Dig.*, page 203, Sec. 5; *McL. Dig.*, *Sanchez's Adm'rs vs. Hart*, 17 Fla., 507; *Thompson vs. Campbell*, 6 Fla., 546; *Yulee vs. Canova*, 11 Fla., 10, 56.

And especially when the case was transferred to the United States Court, because that court had jurisdiction of the whole matter, and the State court had no right to try it again. *Evans & Blade vs. Percefull*, 6 Ark., 424; *Elliott vs. Piersall*, 1 Peters, 340; 2 Peters, 169.

A married woman cannot bring a suit at common law in her own right. The case should be dismissed. *Smith vs. Smith*, 18 Fla., 789 and 199.

When the United States purchased Florida from Spain she purchased all the territory of the Floridas; and the State of Georgia had no more right to take part of the territory than she would if it had been a part of the Spanish Dominion; and all the territory to the established line belongs to the United States, and the United States alone has the right to dispose of lands, and a conveyance made by the United States is superior to all others. *Thomp. Dig.*, *Treaty with Spain*; 1 Peters, 511; 7 Curtis, 686; *Chisholm vs. Coleman*, 43 Ala., (New Series), 204.

No statute of limitation will run against the government. *Angell on Lim.*, Secs. 34 and 37; *United States vs. Hoar*, 2 Mason, 312.

The land in controversy is a part of Florida, proved by the plaintiff in error and admitted by the defendants. It has been conveyed by the United States, and a patent issued therefor, and the plaintiff in error has a perfect chain of titles from the United States, therefore the plaintiff in error has a superior title to all others.

It is the right of nations to establish and fix their bound-

---

---

Coffee v. Groover et al.—Argument of Counsel.

---

---

aries, and all citizens and subjects are bound thereby, and grants issued by these States must yield to the boundary thus fixed. This applies to the States of this Union, with one exception, that is Congress must ratify it. *Poole vs. Fleegu*, 11 Peters, 185; *Rhode Island vs. Massachusetts*, 12 Peters, 657; *Gartice vs. Lee*, 12 Peters, 511.

The *Whitner* and *Orr* line has been established by the States of Georgia and Florida. Code of Georgia, pages 6 and 7, Sections 17 and 21; *McC's. Dig.*, page 952, Sections 8 and 11. And the line has been ratified by Congress. See Act of Congress, 1872.

The land in controversy is in Florida, and has been conveyed by the United States; therefore the plaintiff has a title superior to those claiming under Georgia grants, even if Georgia claims title from Indians. *Angel on Lim.*, Sec. 412; *Johnson vs. McIntosh*, 8 *Whea.*, 571.

The evidence shows that the Georgia grants do not cover the land in controversy.

The defendants in appeal claim Florida land and produce a grant, issued by the State of Georgia, to land that comes down to the Florida line, and they insist that the grant covers land over the *McNeil* line, but the evidence of *G. S. Lanier*, County Surveyor, shows, and also the plats with the grants show, that it only covers land to the *McNeil* line, and does not come south of it. *Brown vs. Huger*, 21 *How.*, 305.

The Georgia grants do not come further south than the *McNeil* line, and therefore do not include the land in controversy.

And even if the grants covered the land the defendants fail to connect themselves in any way with them, for the deeds they produced do not show in what State the land described in them lies, and this defect cannot be cured by

---

---

Coffee v. Groover et al.—Argument of Counsel.

---

---

parol testimony; hence the defendants are not entitled to recover.

The will of Charles E. Groover shows that the executrix had power to act with reference to the land, and should not have been ruled out. A certified copy under the seal was proper evidence.

The suit did not survive to the other defendants at the suggestion of the death of Annie E. Groover, and her administrator should have been made a party.

The verdict of the jury ought not to have been changed by counsel; he was only authorized to put it in form; he changed it, the whole to 48-49ths. Proffatt on Jury Trials, Secs. 443 and 444; Patterson vs. United States, 2 Wheat., 221.

The grounds set forth in the motion for a new trial were sufficient, as they were nearly all the objections, and a new trial should have been granted.

*T. L. Clarke* on same side.

The first, second and third errors assigned may be considered together, they being in substance:

1. That the court erred in refusing to dismiss the action on motion of Coffee, the ground of that motion being that the matter had already been adjudicated in favor of Coffee by United States Court.

2. That the Court erred in ruling that a judgment in U. S. Court against the executrix of Groover did not bind his heirs, and that the question may again be contested by the heirs.

3. That the court erred in sustaining the demurrer of Groover *et al.*, to second and third pleas, and in overruling these pleas.

The defence of *res adjudicata* was raised by both the mo-



---

---

Coffee v. Groover et al.—Argument of Counsel.

---

---

tion to dismiss and the second and third pleas, and it is now unnecessary to determine which was the proper way to make this defence. Both were determined adversely to Coffee.

In the case of Sanchez's Administrators vs. Hart, 17 Fla., 507, this court held "that an administrator or executor could maintain in this State, ejectment upon the title of his intestate or testator. That this right followed necessarily from the duties imposed upon him and from the express language of the statute defining his powers and rights." To enable a plaintiff in ejectment to recover he must show a title at least *superior* to the title of his adversary. If an administrator or executor can maintain ejectment upon the title of his intestate or testator, there exists but the greater reason that he should be competent to defend such action by setting up the title of the deceased. His corresponding right and duty to defend would appear to be more especially imposed by the statute. The statute gives to the executor or administrator the possession of the lands of the deceased; being so in possession, he is the party against whom the action should be brought. The summons in ejectment is "issued to the person in possession, and to all persons claiming adversely or entitled to defend the possession of the property claimed." Rule of Court in Common Law Actions, 83.

The possession of the administrator or executor is the possession of the heir. He is to all intents and purposes the tenant of the heir. The *lis pendens* is a notice to all parties claiming adversely to come in and defend, and Rules 84 and 85, following that just quoted, provide how they shall come in. It occurs to us that the rule referred to (83) was designed to meet just such cases as the one at bar. The suit was against the "executrix in possession and all persons claiming adversely or entitled to defend the

---

---

Coffee v. Groover et al.—Argument of Counsel.

---

---

possession of the property claimed.” The executrix appeared and removed the action by his petition to U. S. Court, when there was a trial and verdict and judgment for Coffee, under which he took possession of the premises. The defence of the executrix was the defence of the heirs and both are bound by the judgment in that action.

5. The fifth error assigned is that the court erred in deciding that a grant issued by the State of Georgia to lands within the limits of the State of Florida, is superior to a grant issued by the United States Government to the same lands, and that the title of the party holding the Georgia grant is superior to the title of the party holding under the United States Government.

It is admitted that the land in controversy is in Florida, and has always been in Florida. It was surveyed as Florida land by the United States Surveyors, and included in fractional section 29. This is shown by the testimony of Lanier, an old surveyor, who testifies that he traced the line only a few days before trial. Coffee testifies “that he came to Florida in 1839, and his brother then had this land in possession, and had cleared a part of it. That his brother had only a claim, the land not having been put on the market. That he, plaintiff in error, bought his brother’s claim.” This claim and possession go back prior to 1839. Three years afterwards, in 1842, the grant of the State of Georgia issues to Groover. This is the first we hear of Groover having any claim. Coffee perfects his title as soon as the United States issues her patent to the State of Florida. This was in 1857. After reciting this, Coffee says: “Mr. Chas. A. Groover had a clearing on part of the land in controversy and I had a part of the land in cultivation that was included in my deed and south of the Watson line, and as there was a dispute between myself and Charles A. Groover about said land we agreed to let it

---

---

**Coffee v. Groover et al.—Argument of Counsel.**

---

---

remain as it was till Congress should settle it.” The grants from the State of Georgia did not purport to convey to Groover any land south of the Florida line. Both plats show the southern boundary of these lots to be the Florida line. We must bear in mind that these grants state only the numbers of the lots and the quantity of land they contain without giving their extent east and west or north and south. Everitt P. Groover, one of the witnesses, gives the distance from their northern boundary to the Watson line, but failing to give the extent east and west does not show that it is necessary to come below the McNeil line to get all the land the grants call for. Lanier, the County Surveyor of Madison county, says he has surveyed entirely around fractional section 29, and that it extends north to the “McNeil line.” That while he did not survey the “Watson line” he crossed it and saw that it passed through a large swamp that extends almost as far north as the “McNeil line.” When shown the Georgia plats he says “they indicate no such swamp on their southern boundary. That he has been a deputy surveyor in Georgia and is acquainted with Georgia surveying, and that from an inspection of these plats he would say that these grants do not cover the land in controversy, because in Georgia the surveyors had to put down on their plats the face of the country, that is to mark the ponds, swamps, branches, &c. That these plats show no swamp on their southern boundary, and if the grants come to the Watson line they would show the large swamp referred to.”

But if the State of Georgia intended to grant as far south as the Watson line the case then stands thus: Prior to 1839 the Coffees came to Florida and took possession of the land as Florida territory, cleared and cultivated a portion of it. In 1842 the Groovers cover it with a Georgia grant. Coffee goes on and as soon as it is put in market gets the Uni-

---

---

Coffee v. Groover et al.—Argument of Counsel.

---

---

ted States title to it. A dispute arises as to which State it is in and which has the better title. They agree to abide the action of Congress in the settlement of the line between the two States. When the line is finally located the land is clearly and certainly in Florida. The Groovers fail to keep faith and the legal contest commences. Now which has the better title, Coffee who first took possession and as soon as possible afterwards procured his title from the General Government, which was the real owner, or Groover, who, after Coffee had taken possession and cleared and was cultivating a portion of the land, procures a grant from the State of Georgia, which State it is now admitted did not own the land?

6. It is well settled that no person can by mere occupancy acquire title against the United States government. The State of Georgia certainly never had any rightful jurisdiction over this property. At best it was but a "squatter." The Coffees claimed and held possession of the land at the time of and before the State of Georgia attempted to grant the land to James Groover. Coffee perfected his title from the United States government before the establishment of the Orr and "Whitner line." Had he attempted to oust Groover by obtaining a title from Florida after the establishment of that line, then his action, to say the least of it, would have been inequitable. But both parties seeking to acquire the title to the land before the location and establishment of the line, and each having obtained a title from their respective States, we submit that it makes a far different case. Coffee having had a prior possession, and having, before the fixing of the line, obtained a title from the State of Florida in which the real legal title was vested, has all the equities supported by the prior legal right and the legal title emanating from the General Government.

7. Neither the deed from James Groover to Thomas A.

---

---

Coffee v. Groover et al.—Argument of Counsel.

---

---

Groover, nor the deed from Thomas A. Groover to Charles A. Groover, show in what State the land they purported to convey is situated. The deeds appear to have been made in Georgia where the parties reside, the former locating the land in *Lowndes* county and the latter in *Brooks* county. Other States in the Union have counties bearing the same name, and as it nowhere appears that *Brooks* and *Lowndes* counties are the same county the location and description is indefinite, uncertain and insufficient. This deficiency should not have been supplied by parol testimony admitted against the objection of plaintiff in error.

8. The court refused to permit a certified copy of the will of Charles A. Groover to be read in evidence. The objection to its introduction was that it was not properly certified and did not appear to have been proved and admitted to probate in Florida. It is certified by the Ordinary of Brooks county, Georgia, as a copy from the records of his court, and has the seal of the court of Ordinary of Brooks county, Georgia, attached. This is sufficient to admit it as a record of a court of another State under our statute. McL. Dig., 513, Sec. 2.

The fact that the will is a record of the Court of Ordinary of Brooks county, Georgia, is conclusive of its probate in that court. No further proof is required to admit it to probate in Florida. McL. Dig., 987, Sec. 8.

Besides, if we apply the same doctrine to the will that the court has applied to the deeds no probate in Florida could be necessary. The will was made November 27, 1865. The testimony shows that Charles A. Groover died about this time and long before the establishment of the "Orr and Whitner" line. If Georgia could pass the land to Florida by her grants a probate of the will in her courts was certainly competent to establish the validity of the will and pass the title to the devisees therein named. Under the

---

---

Coffee v. Groover et al.—Argument of Counsel.

---

---

will the wife and executrix is a necessary party to this suit. She takes a child's part in the property in controversy. It appears from the pleadings that some of the children are yet minors. The will postpones the division of the property till the youngest child becomes of age or marries. The executrix is consequently still in possession of the estate, and as such could maintain ejectment. *Sanchez's Adm'rs vs. Hart*, 17 Fla., 507.

Can the heirs sue till the administration is finished? Is not the right of action limited to executrix? If not, could both the executrix and the heirs prosecute separate suits for the property at one and the same time against Coffee? If we admit that either the heirs, or personal representatives of a deceased, may maintain ejectment upon his title, then certainly both may sue. And if the judgment in this cause is finally for Coffee the executrix may take her turn at him when he gets through with the heirs.

9. The action is for the recovery of the whole property and not for an undivided interest. Upon the suggestion of the death of Annie E. Groover the suit was revived against the objection of plaintiff in error in the names of all the surviving plaintiffs, and there was nothing in the pleadings or testimony concerning any undivided interest in the land. When the jury came into court they announced that they found for the plaintiffs and assessed their damages at \$500—a verdict for the whole and damages for the detention of the whole. The counsel put the verdict in form and inserted forty-eight forty-ninths of the land, but kept all the \$500 damages.

10. The grounds set forth in the motion for a new trial cover all the errors assigned. And for the reasons hereinbefore set forth a new trial should have been granted by the court below.

---

---

Coffee v. Groover et al.—Argument of Counsel.

---

---

*Pasco & Palmer* and *C. W. Stevens* for Defendant in Error.

The defendants in appeal who were plaintiffs in the court below offer the following arguments against the positions taken by plaintiff in appeal in his citation of errors alleged by him to exist in the record of the judgment herein rendered in Jefferson Circuit Court.

1, 2, and 3. The first three errors assigned relate to a defence set up against the action of ejectment instituted by defendants in appeal against plaintiff in appeal; that he had recovered possession of the lands in dispute in an action tried in the United States Circuit Court against Mrs. Groover as executrix or administratrix of Charles E. Groover, through whom these defendants claim title as heirs. In the Circuit Court this plea was demurred to and the demurrer was sustained, and properly so.

(a.) If the facts as set up in the plea were a good defence the plaintiff in appeal could have availed himself of this defence upon the plea of not guilty.

(b.) But they did not constitute a good defence, for it is well settled that a judgment against an administrator does not bind the heir. Freeman on Judg. §163; Bigelow on Est., 78, 79.

4. Some of the parties claiming title to the land are married women and have sued in their own names, their husbands joining with them, which is in accordance with the rule at common law and consistent with the decisions of this court. Bacon's Abr. Baron and Femme, 500; 1 Minor, 347; Lignoski vs. Bruce, 8 Fla., 269.

5 and 6. The questions covered by these alleged errors came before this court at the former appeal, and we do not propose to re-argue them unless the court so directs.

7. We think that the deeds sufficiently show where the

---

---

Coffee v. Groover et al.—Argument of Counsel.

---

---

lands are located. But evidence is surely admissible to identify and locate the land in all actions of ejectment. 2 Greenl. on Ev., §308; 1 Greenl. on Ev., §310, and note, *Hogans vs. Carruth*, 18 Fla., 587.

8. The will was properly excluded. It was not probated, nor was it proved according to law. *Stringer vs. Young*, 3 Peters., 336; McC. Dig., 987, §8; 2 Greenl. on Ev. §315.

9. There was no variance between the verdict as originally brought in and as afterwards returned by the jury and recorded, and if there were, the jury had the right to change it, if they thought it did not speak the truth, as long as the case remained in their hands. *Hilliard on New Trials*, 118, 121; *Proffatt on Jury Trial*, 456, 457, 461, 463, and 464. The jury, under leave of the court and by consent of parties, separated late in the afternoon, after being charged by the court on the law of the case. They were to re-assemble in the morning for deliberation and it was expressly agreed that if their verdict was not in form it should be amended under the instructions of the court. Before deliberating in the morning they again came into the court and were further charged. They returned to their room and found a verdict for plaintiffs generally, and assessed damages at \$500. Plaintiffs claimed  $\frac{48}{49}$ ths of the land, and it only remained to describe what they claimed and there was no conflict in the testimony on this point. One of the joint owners had died after the last appeal had been decided. She owned an one-seventh interest in the land. All of this descended to her brothers and sisters, co-plaintiffs, six in number, except one-seventh (or one forty-ninth of the whole), which went to her mother who was not a party, leaving forty-eight forty-ninths in plaintiffs, which the jury found. No part of the damages belonged to the mother. The \$500 was the amount found for plaintiffs and they did not change these figures. The



---

---

Coffee v. Groover et al.—Opinion of Court.

---

---

evidence would have supported a larger amount. Plaintiffs' attorneys wrote out a form of verdict under the direction of the court. Defendant's attorneys examined it and suggested no change, they only objected to it generally. The jury retired, filled out the form, signed it and brought it in as their verdict, and it was so recorded. It was in all respects such a verdict as they had a right to find and is supported by the evidence.

10. The merits are the same as when the case was here before. They were then so strongly with the Groovers that this court reversed the former judgment. At the second trial the jury was charged in accordance with the law as laid down by this court and the result was in harmony with the former decision here made.

THE CHIEF JUSTICE delivered the opinion of the court.

This was an action of ejectment brought by defendants in error to recover lands in Madison county, and tried in Jefferson on change of venue. A former trial resulted in a verdict for plaintiff in error, which was set aside on appeal by this court in June term, 1882. 19 Fla., 61.

The second trial, in March, 1883, resulted in a verdict and judgment for the plaintiffs below, defendants in error, and now the defendant below brings error.

The present record brings up questions of pleading which were not before this court at the former hearing, the plaintiff below having been the appellant.

The errors assigned will be considered in their order:

I. The *first* is that the court refused to dismiss the cause on motion of defendant below, on the ground that the matter had been adjudicated in the Circuit Court of the United States in his favor.

A former recovery relating to the same cause of action,

---

---

Coffee v. Groover et al.—Opinion of Court.

---

---

as between parties and privies, may be matter of defence as an estoppel, to be proved at the trial, but it is not good ground of a motion to dismiss, and the motion was properly denied.

II. The *second* assignment of error has no foundation in the record. We do not find that the court decided that a judgment as between plaintiffs in error and the executrix does not bind the heirs of decedent. No such judgment was offered at the trial.

III. The *third* assignment is that the court erred in sustaining the demurrer to the pleas of *res adjudicata*.

In ejectment all legal defences may be made under the plea of not guilty, and the special denials mentioned in the statute. McC. Dig., 481. Special pleas of matter affecting the legal title, or in estoppel, only encumber the record and tend to embarrassment. Wade vs. Doyle, 17 Fla., 522; Neal vs. Spooner, *supra* 38. They should be struck out by the court *sua sponte*, or on motion or on demurrer, because they are not proper pleas; but a judgment sustaining a demurrer will not preclude proof on the trial of the facts so improperly pleaded. There was no error in the ruling.

IV. The *fourth* ground of error is that two of the defendants are married women, and they cannot maintain a suit at law in their own right, nor their husbands in the right of their wives, independent of them.

This assignment we do not think applicable to the case. The husbands and their wives are joined as plaintiffs here in the right of their wives. This is the correct practice. Tyler on Eject., 169; 1 Chitty's Pl., 82.

V. The *fifth* ground is "because the court erred in deciding that a grant issued by the State of Georgia, to lands outside of the State of Georgia, and within the limits of the State of Florida, is superior to a grant is-

---

---

Coffee v. Groover et al.—Opinion of Court.

---

---

“sued by the United States Government to the same lands, “and that parties holding the said lands in Florida by said “Georgia grant, have superior title to one claiming under “the U. S. Government”: and the *sixth* ground is “because “the court erred in deciding that a party holding land in “Florida under a Georgia grant for a long time acquired a “title superior to that of the United States Government, “thereby deciding that the statutes of limitation could run “against the government.”

We do not understand this to be the ruling of the court at the trial, in substance or in effect.

The testimony is substantially the same as that which was before the court upon the former trial. See 19 Fla., 68, *et seq.* It shows that the boundary line between Georgia and the Territory, and the State of Florida, was uncertain and in dispute; that in 1842 Georgia granted this land to James Groover, describing it as land in what was then Irwin county, Georgia; that the survey and plat by which the grant was made were made in 1820 by the Surveyor-General of Georgia; that the State of Georgia, through all the departments of its government, and the local authorities of Irwin and other counties, which were created out of Irwin county, claimed and exercised control and jurisdiction of the territory as far south as the line known as the Watson line, and the courts exercised jurisdiction, civil and criminal; conveyances of land located there were recorded in Georgia; people living there were summoned as witnesses and jurors; the estates of people dying there were administrated in the courts of Georgia; lands were surveyed, platted and granted by the authority of the government of that State down to the time of the establishment and recognition of the “Whitner and Orr” line by the States of Florida and Georgia, and by the Act of Congress of April 9, 1872.

---

---

Coffee v. Groover et al.—Opinion of Court.

---

---

James Groover, the grantee of Georgia, was in possession of the land under the grant of 1842 at that time, and he and his grantees and the plaintiffs as heirs of such grantees remained in possession, improving and cultivating it, until they were dispossessed in 1876 by Coffee, against whom this suit is prosecuted.

No definitely marked boundary line between Georgia and the Spanish province of Florida, or between Georgia and the Territory or State of Florida, had ever been recognized by the respective governments until the Whitner and Orr line was recognized by Congress in 1872. The boundary was in doubt and in dispute up to that time when the Whitner and Orr survey, made under the authority of the respective States, was for the first time recognized, and grants made by Georgia down to the Watson line were also recognized. (We refer to the opinion of this court in Groover vs. Coffee, 19 Fla., R., 61, 76, for a more detailed statement of the action of the respective State governments on the subject.)

On the part of the defendant below, it was shown that the land in dispute was patented by the United States to the State of Florida, July 6, 1857, under an act of Congress of September 28, 1850, as "swamp and overflowed land," it being a part of fractional section twenty-nine, in township three, north, and range nine, east. On September 2, 1857, the Register of the Florida Land Office issued a certificate of purchase to McCall and Stripling, who assigned and conveyed to A. J. Coffee November 12, 1858, and on the 12th September, 1874, the Trustees of the Internal Improvement Fund of Florida executed a deed of the said section 29 to Coffee. Coffee testifies that in 1839 his brother had a "claim on this land and cleared a part of it before it came into market, and he bought his brother's claim; that Charles A. Groover had a clearing also on it, *north* of the

---

---

Coffee v. Groover et al.—Opinion of Court.

---

---

Watson line, Coffee's clearing being *south* of that line, and Coffee never took actual possession of the portion north of said line (which portion of section 29 is the territory in dispute) until after the act of Congress of 1872. The Groovers were dispossessed in 1876 by Coffee as appears by the testimony, and Coffee has been in possession since that time.

There is nothing in this record nor in the history of the government of the Territory or the State of Florida showing that the authorities of the latter exercised any of the powers of government over this portion of section 29 lying north of the Watson line up to the time of the survey of the Whitner and Orr line, which was recognized and adopted as the boundary February 8, 1861, by the Legislatures of Georgia and Florida, and recognized by Congress in 1872.

The court and jury did not decide, as is assumed by plaintiff in error, "that a grant by Georgia of lands outside her territorial limits and within the State of Florida is superior to a grant by the United States government," nor "that the statute of limitations could run against the government." What they did decide was that grants by a government *de facto* of parts of a disputed territory in its possession are valid against the State which had the right (12 Wheaton, 600); and that when a territory is acquired by treaty, cession or conquest, the rights of the inhabitants to property are respected and sacred. Rhode Island vs. Massachusetts, 12 Peters, 657, 749; s. c., 4 How., 591, 639; P. S. vs. Clark, 8 Pet., 436, 445. And the principle applies to the States of this Union. Poole vs. Fleegler, 11 Pet., 185, 209. In the latter case the court says (p. 210): "Although, in the compact, Walker's line is agreed to be in future the boundary between the two States, it is not so established as having been *for the past* the true and rightful boundary."

---

---

Coffee v. Groover et al.—Opinion of Court.

---

---

We decided this to be the rule in the present case when it was before us on the former appeal, (19 Fla., *supra*,) and the cause was tried the second time under the influence of the opinion and judgment of this court. We find no reason for modifying that judgment, and the error assigned is not sustained.

VI. The *seventh* error assigned is, that the court erred in admitting two deeds which do not show in what county or State the land described in them is situated, and it was improper to supply the deficiency by parol.

In Atwater vs. Schenck, 9 Wis., 160, a deed was offered which described the land but did not mention the county or State. An offer was made to identify the land by a witness and the court said "this was competent evidence." To the same effect: Hogan vs. Carruth, 18 Fla., 587, 590; Cutter vs. Carruthers, 48 Cal., 178, 184; 2 Greenl. Ev., §308. The oral testimony in this case clearly proved the identity of the premises and the boundaries, and this was competent evidence. The deeds in this case hardly required any such explanation by parol.

VII. "The court erred in ruling out the last will and testament of Charles E. Groover, refusing to allow it to be read in evidence."

The paper offered was certified by the Ordinary of Brooks county, Georgia, that the "foregoing copy of the last will and testament of Charles A. Groover and codicil is a true copy from the records of this office." There is no certified copy of any proceeding of any court showing that the will had been duly proved or recorded by authority of law. McC. Dig., 513, §2; id., 987, §8. It was not competent evidence. 2 Greenl. Ev., §§310, 315.

VIII. The ninth error assigned is "in permitting a variance between the verdicts as brought in by the jury at first and that prepared by the attorneys for plaintiffs, the ver-

---

---

Coffee v. Groover et al.—Opinion of Court.

---

---

dict of the jury being for the plaintiffs (defendants in error) and five hundred dollars damages, but the verdict as prepared by the attorneys being for forty-eight forty-ninths of the land and the same amount of damages.

The record shows that the jury brought in a verdict generally for the plaintiffs and assessed the damages at \$500, which was not entered in the record. The court then directed plaintiffs' attorney to prepare a verdict in proper form, and a verdict having been prepared was submitted to the jury with instructions from the court to retire and examine the verdict as prepared, and if they found it to be their verdict to bring it in as such, and the jury then retired and returned it into court in writing. The jury found that the plaintiffs were "entitled to recover the interest claimed by them in the land in controversy, to wit: forty-eight forty-ninths" of the land, (describing it in full) "and the jury assess the plaintiff's damages at five hundred dollars." This verdict was recorded and judgment entered upon it.

It is evident that if the verdict as first handed to the court had been recorded and judgment entered upon it, there would have been error, as the verdict was not in compliance with the statute. It was within the power and it was the duty of the Judge before recording such verdict to recommit the matter to the jury and call their attention to the want of form and instruct them how to correct it. This was the effect of the action of the court. In a similar case in Maryland, after the court had adjourned for the day the jury signed and sealed a verdict and delivered it to the clerk, and when called to the bar next morning, before the verdict was recorded, they were sent back to correct it, as it did not determine the issues joined in the cause to their full extent, and they found a new verdict which did. The court held that a judgment entered on the second verdict was correct. *Edlin vs. Thompson*, 2 Har. & Gill., 31. The rule is

---

---

Coffee v. Groover et al.—Opinion of Court.

---

---

that a jury may vary the form or correct a verdict before they are discharged and before it is recorded. Where the court put a verdict into form and it is read to the jury and they assent, this is sufficient. *Rapps vs. Parker*, 4 Pick., 238; *Osgood vs. McConnell*, 32 Ill., 74; *Wright vs. Phillips*, 2 Greene, 191; *Burk vs. Comm.*, 5 J. T. Marsh., 675; *Proffat on Jury Trials*, Secs. 456, 461, and citations.

IX. As to the verdict for the forty-eighth forty-ninths of the land. The suit was commenced by seven plaintiffs who were shown to be the children and heirs at law of Charles A. Groover, (to whom the land was conveyed by the grantee of the original patentee from the State of Georgia,) and who died in possession in 1866. Annie E. Groover, one of the plaintiffs, died since this suit was commenced, leaving the six surviving plaintiffs and her mother as her heirs at law. It does not appear that she was married, or that there was an executor or administrator appointed. At her death her estate descended by our statute to her mother, brothers and sisters. McC. Dig., 468. Her interest in the property was one-seventh, and her mother inherited one-seventh of one-seventh, to-wit: one-forty-ninth, and the brothers and sisters six-sevenths, and thus they became the owners of forty-eight forty-ninths.

Before the last trial the death of Annie E. Groover was suggested upon the record, and it was ordered that the action proceed at the suit of the surviving plaintiffs.

Section 42 of Chapter 1096, Laws of 1861, McC. Dig., 829, Sec. 73, provides that if there be two or more plaintiffs and one or more of them should die, if the cause of action survive to the surviving plaintiffs, the action shall not be thereby abated, but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiffs.

Under this statute the suit was properly continued in



---

---

Coffee v. Groover et al.—Opinion of Court.

---

---

the names of the survivors, as their right of action to six-sevenths was not affected by the death of the co-plaintiff. At her death the legal title to six-sevenths of the one-seventh which had belonged to the deceased was vested, *cum onere*, in the survivors, and thus the entire right and title of the survivors, to-wit: forty-eight forty-ninths which had been involved in the issue, remained so.

By rule 87, Circuit Court rules, "in case of the death of one or more of several plaintiffs in ejectment, where the right does not survive to the remaining plaintiffs, the action may proceed at the suit of the surviving plaintiff for such share of the property as he claims," or the legal representative of the deceased may be made a co-plaintiff.

Under this rule the right of the mother to the one forty-ninth not being involved in the issue, as she was not a party to the suit, of course had not survived to the remaining plaintiffs.

The jury were clearly right in finding that the plaintiffs were entitled to recover such interest in the land as was thus vested in them by law.

As to the amount of the damages assessed, it is objected that the first verdict was for the plaintiffs generally, and for the whole property and \$500 damages, and when the verdict was put in form for forty-eight forty-ninths the amount of damages was not also reduced.

We see no substance in this objection. The jury in the first instance found that these plaintiffs had suffered damage to the amount named and upon examination of the testimony that amount is fully supported. The testimony is that a fair average rental for the tillable land, (about eighty acres,) was one dollar and seventy-five cents per acre, and that Coffee had occupied it for about seven years. This testimony would sustain a much larger amount of damages in favor of these plaintiffs.

---

---

Walls v. Endel et al.—Statement of Case.

---

---

This answers the assignments of errors, as we understand them, and all the points made on the motion for a new trial. We find no error in the record and the judgment is affirmed.

---

JOSIAH T. WALLS, APPELLANT, VS. M. ENDEL ET AL., AP-  
PELLEES.

1. A defence on "equitable grounds" may be interposed in ejectment by plea under the practice act of 1861. Such facts may be pleaded as would entitle the defendant to an injunction against enforcing the judgment if he filed a bill alleging the same and prayed an injunction.
2. A defence on equitable grounds in ejectment, the plea alleging that defendant was the owner of the property, and that plaintiff's title though a deed absolute in form, was executed as a security to the plaintiff for money and other advances by him to the defendant, is good; and if proved will entitle the defendant to a verdict. Such deed is in law and equity a mortgage, and the remedy upon it is by foreclosure and sale for the amount secured.
3. Evidence to show that a deed absolute is in equity a mortgage may be given by parol under a plea on equitable grounds under the statute.
4. A mere extract from a record of a judgment is not evidence to prove a judgment. The whole record or an authenticated or proved copy is necessary.
5. A judgment in proceedings for forcible entry and detainer, is not evidence in ejectment, either in bar of a right of recovery of the premises, or of mesne profits.
6. A tax deed describing "one house and lot in Gainesville" is bad for uncertainty.

Appeal from the Circuit Court for Alachua county, Hon. James M. Baker, Judge of the fourth Circuit, presiding.

Moses Endel and Marcus Endel brought their action of ejectment against appellant, to recover a lot in Gainesville,

---

---

Walls v. Endel et al.—Statement of Case.

---

---

claiming title. Walls pleaded not guilty, and also tendered and filed a "plea on equitable grounds," as follows:

That on the 28th day of July, 1876, he was the owner and possessed the lot described in the declaration; that desiring advances to carry on his planting and plantation business, he applied to and obtained advances from the plaintiffs to carry on his planting operations, and that he agreed to secure the plaintiffs with said property; that thereupon he procured a paper to be drawn, which was an absolute deed in form; that he objected to giving such paper, and that Moses Endel told him and his wife that all they wanted was security, and that they would give to them a paper writing back, which they, the Endels, did under date of 29th July, 1876; that defendant has been in the possession and occupancy of said property, as the owner thereof; that at the time of making said deed he owed the Endels but a small amount, and the relation of debtor and creditor has always existed between them, and that if the Endels have any interest it is only a mortgage interest.

For a second plea on equitable grounds, defendant says that he is in possession of said property, having been placed in possession by virtue of a bond or obligation for title dated 29th July, 1876, and that no proceedings of any kind have been brought to cancel the bond or agreement to convey, and that no demand or notice of default has been made on him requiring payment.

On motion these pleas were stricken out by the court on the ground that under such equitable pleas justice could not be done between the parties. On the trial the court excluded testimony in support of such equitable defence.

To maintain the suits plaintiffs introduced and proved a deed executed by Walls and wife, conveying to plaintiffs the property in question in fee, and showed the rental value. Deed was dated 28th July, 1876.

---

---

Walls v. Endel et al.—Statement of Case.

---

---

Defendant offered in evidence a paper dated 29th July, 1876, executed by plaintiffs, by which they covenanted to convey to defendant the same property on payment to them by defendant of \$1200 by the first day of December, 1877. Upon objection by plaintiffs, the court refused to admit the paper in evidence.

Defendant offered the “judgment” in a proceeding for forcible entry and detainer in favor of Walls against plaintiffs rendered in April, 1881, for three hundred and ninety dollars damages besides costs which was recovered by Walls against plaintiffs for having unlawfully turned Walls out of possession and for detention. This was offered for the purpose of showing that the rents during the time of the unlawful detention had been adjudicated and could not be recovered by plaintiffs against defendant.

The “judgment” offered in evidence consisted apparently of the minutes of the Circuit Court, and not the whole record or a copy of the whole record.

The paper being objected to by plaintiffs was excluded by the court.

Defendant offered in evidence a deed to Isaac Saunders executed by the County Clerk for unpaid taxes, dated April 30, 1877, conveying “one house and lot in Gainesville,” assessed as the property of J. T. Walls for the taxes of 1875. This being objected to the court refused to receive it on the ground that the description was too indefinite to identify the property as the lot in question.

The jury found for the plaintiffs, and judgment being entered upon the verdict defendant appeals and assigns for error the ruling of the court in striking out the plea on equitable grounds and refusing to hear the testimony in support of it, the rejection of the record of judgment in the forcible entry and detainer case, and the tax deed.

---

---

Walls v. Endel et al.—Argument of Counsel.

---

---

*E. C. F. Sanchez* for Appellant.

*Finley & Hampton* for Appellees.

The second ground of error assigned is, that the court below erred in striking out the equitable plea of defendant, "upon the ground that under such an equitable plea justice could not be done between the parties." An equitable plea is not admissible in an action of ejectment. *David Petty vs. George H. Mays*, 19 Fla.

The equitable plea offered by the defendant (Walls) sets up that the deed which was given by him to Endel & Son was intended as a mortgage. To admit such a plea in an action of ejectment would produce such a multiplicity of issues of law and fact that justice could not be administered. The jury would have to determine the facts and circumstances, and the court would then have to adjudge whether upon such a state of facts the instrument was intended or not to be a mortgage. Such a plea would invite the violation of a well established rule of evidence, viz: "That parol evidence is inadmissible (*in a court of law especially*) to vary the terms of a written instrument."

We do not controvert the position that the defendant might have gone into a court of chancery and prayed for the right to redeem as a mortgagor. But there, in order to get equity, he would have to do equity. Such would not be the case in an action of ejectment. The whole doctrine of declaring a deed absolute on its face to be a mortgage, is *peculiarly* and *solely* a matter of the jurisdiction of a court of equity, having its foundation in the idea of mistake or fraud, or some other equitable ground. *Chaires vs. Brady*, 10 Fla. R., p. 133. For the law holds parties to their written contracts, especially when the terms of the contract or instrument are plain and unambiguous.

---

---

Walls v. Endel et al.—Argument of Counsel.

---

---

In an action of ejectment an absolute deed, regular upon its face and properly executed, is admissible as evidence of title. To be construed as a mortgage would require that the deed be reformed. But a court of law has neither the power nor process to reform a deed. It could not enforce the equitable maxim which requires the party who asks equity to do equity. Hence the Judge of the court below, in striking said equitable plea, is sustained by the statute which provides as follows, viz: "In case it shall appear to the court or a Judge that any such equitable plea \* \* cannot be dealt with by a court of *law*, so as to do justice between the parties, it shall be lawful for such court or Judge to order the same to be stricken out." \* \* Sec. 64, McC. Dig., p. 827, and *id.*, p. 826, Sec. 55.

The plea of the general issue, or "not guilty," put in by the defendant, shall put in issue the title of said land in controversy. *Id.*, Sec. 2, p. 481. Under the law and practice in Florida no plea is admissible in an action of ejectment but the general issue, except to deny the possession of defendant, as required by the act of February. *Id.*, p. 481, Sec. 6. The statute of limitations and every other admissible defence may be given in evidence under the general issue in ejectment. *Wade vs. Doyle*, 17 Fla. R., p. 522; *Gale vs. Hines*, 17 Fla., p. 773; *H. H. Weiskoph vs. Abby J. Dibbles*, 18 Fla., pp. 24, 28.

If then the defence attempted to be set up in the equitable plea of the defendant, Walls, in the court below, could have been available by evidence under the general issue, (without doing injustice to the parties in a court of law,) even in that case the equitable plea would be stricken. *Spratt vs. Price*, 18 Fla. R., 289; *Fla. Central R. R. Co. vs. H. Bisbee*, 18 Fla., 61. All the issues of law and fact in regard to the title and the rents and profits may be tried in a court of law. *Cavedo vs. Billings et al.*, 18 Fla. R.,

---

---

Walls v. Endel et al.—Argument of Counsel.

---

---

p. 261. If the defence set up in the said equitable plea raises an issue of fact or of law in regard to the title and the rents and profits (which it certainly does) such issue may be tried at law, (16th Fla., 261,) and if it is available at law the plea will be stricken. 18 Fla., 289.

Third. The third ground of error assigned by applicant's counsel is, "because the court erred in allowing the plaintiffs below to introduce deed from Walls to them, though absolute on its face, when it was shown it was given to secure advances." In the first place it is *not true in fact* that when this deed was offered in evidence by the plaintiffs "it had been shown that it was given to secure advances." This could not be true, for the deed is the first evidence introduced by the plaintiffs to establish their title. And if it could have been shown by the defendant that the deed was given to secure advances that would be no reason why the deed should not go to the jury. If the deed is regular and absolute on its face, and pertinent to the issue, it should go to the jury, even though it could be shown by extrinsic evidence that it was given to secure advances, or impeached in some other way. *Hogans vs. Carruth*, 18 Fla., 587.

Fourth. The fourth ground of error is, "that the court erred in refusing to allow R. F. Taylor, witness for plaintiff, to testify on cross as to whether or not it was intended for a deed, and the conditions under which it was made and executed.

The record shows that the witness, Taylor, did fully testify to the equitable grounds claimed by defendant, and that his testimony goes to refute the position assumed by defendant. It shows that the deed was intended to be what it purported to be, an absolute conveyance; that it was regarded by the parties as such, and that Walls agreed to pay rent for the premises; that the subsequent agreement in writing (which defendant in the record calls a *defeasance*, but

---

---

Walls v. Endel et al.—Argument of Counsel.

---

---

which is a *bond for title*,) was intended to be what it purported to be, a *bond for title*, and *not* a defeasance; that it was not a simultaneous transaction with the deed from Walls, but *made and executed the NEXT DAY AFTER THE DEED was delivered and recorded, and was a new contract*.

But if these two instruments are taken together it would certainly seem that if the terms of the first contract did not express the intention of the parties, the second would. Will any court in the world allow parol evidence to vary the plain and unambiguous terms of both these contracts, and that, too, without any allegation or pretence of fraud or mistake?

The second instrument is not a *defeasance*, but is a *bond for title*; and a bond for title taken by Walls from the Endels implies and admits their title. The reasoning of Mr. Justice Westcott in delivering the opinion of this court in the cause of Mathews vs. Porter, 16 Fla., pp. 492-3, is very pertinent and conclusive on this point.

The doctrine that a deed, absolute on its face, can be shown to be intended to operate as a mortgage by *parol* evidence is quite unsettled by the adjudications of the different States.

We submit, however, that if parol evidence is ever admissible to vary or contravene the terms of a plain written instrument, it is not so admissible except in *equity, and not in action of ejectment*.

That *parol* evidence is “not admissible to contradict or vary the terms of a valid written instrument,” this court says, “is well settled.” See Robinson vs. Barnett, 16 Fla., 602. There are *thousands* of authorities to sustain this proposition—it is too well settled to quote from them. If the contract is *disputed*, or the terms are *uncertain*, contemporaneous facts and circumstances to throw light upon the disputed contract itself may be admitted, but here the



---

Walls v. Endel et al.—Argument of Counsel.

---

contract is plain, and *without ambiguity, and no fraud or mistake set up or pretended*. In Patchin vs. Pierce, 12 Wend., 61, Chief-Justice Nelson remarked: "An absolute deed may, *in equity*, be turned into a mortgage by parol proof, but that is on the assumption of *fraud* in the grantee, upon which ground the action of the court is sustained. If there is a mistake in the mortgage as to the amount of indebtedness of the mortgagor, the remedy in *all cases* of this kind is to be sought in a court of equity." The same doctrine is held in Bryant vs. Crosby, 36 Maine, 562, and in House vs. Russell, 36 Maine, 115.

In Arkansas parol evidence has been held admissible in *equity*. See Blakemore vs. Byrnside, 2 Eng., 505. But this was on the assumption of fraud. See Jordan vs. Fenno, 8th, 593. In Missouri an absolute deed cannot be shown to be a mortgage *at law*. See Hogel vs. Lindel, 10 Miss., 483. In Maryland parol evidence is held inadmissible unless in case of fraud, surprise or mistake. Watkins vs. Stockett, 6 Har. & John., 128.

But in the case at bar the evidence produced by the defendant shows, both by the written instrument or *bond*, as well as by parol, that there was no defence but a *bona fide* sale by Walls to the Endels, and afterwards a bond for title, being two separate and distinct transactions.

The evidence shows that Walls owed the Endels but a small amount (less than \$100) on account, and that the additional consideration for the deed was paid by the Endels to or for Walls, and that Walls recognized and admitted the sale by agreeing to pay rent, as testified to by witness Taylor.

We beg again to refer to the case of Mathews vs. Porter, 16 Fla., 466, *et seq.*, where it is held that the *clearest* and *strongest* testimony is required to turn an absolute deed into a mortgage. Such is not the case, as shown by the record

---

---

Walls v. Endel et al.—Argument of Counsel.

---

---

in this case. The preponderance of even the parol evidence shows that the deed was intended to be a deed absolute as it is written and executed.

As to the fifth error assigned, we reply that the record shows that the evidence had already been introduced by defendant in regard to the rent. The law is that “where one party resorts to parol evidence to impeach an instrument, the adverse party may, of course, meet this by parol evidence on his part.” *Averill vs. Loucks*, 6 Barb., p. 19, and 6 Duer., 203.

In regard to the sixth error assigned, the answer to the fourth error is responsive. The witness Taylor, as the record shows, did fully testify as to the conduct of the parties and circumstances attending the execution of the papers.

To the seventh error we reply that the agreement to convey or bond for title, unless it showed a defeasance, was not proper evidence in an action of ejectment. The instrument is a bond for title and necessarily admits the title in the Endels, and if admitted would not have helped the defendant.

To the eighth error we reply that the defendant did testify fully on the subject of the deed. But he is by law estopped from denying the terms of the deed or its consideration. 10 Barber, 582, (*Taylor vs. Baldwin*,) and *Patchin vs. Pierce*, 12 Wend., 61; *Shemerhorn vs. Banderheyden*, 1 Johnson, 139, 3d American Decisions, p. 304. Besides it was immaterial whether a consideration was ever paid or not so far as this case was concerned. It might be cause for action to recover the purchase money.

9. The question contained in the ninth error is immaterial.

10. The matter contained in tenth error is immaterial and improper in an action of ejectment.

The next error assigned is “because the court erred in re-

---

---

Walls v. Endel et al.—Opinion of Court.

---

---

fusing to allow defendant to introduce tax deed to Isaac Sanders, upon the ground that the description was insufficient." A description of the property in a deed cannot be too minute and accurate. Indefiniteness in description avoids the sale, as in deed to lands sold for taxes. 4 Cruise, Digest, p. 221; 10 Gill and Johnson, p. 207.

The description of the land in the tax deed referred to is "a house and lot in the town of Gainesville," not giving the number of lot or streets, or boundaries, or any description of the location, not even the county or State. A sheriff's deed, which describes the land as "all that plantation or tract of land lying in Sumter District," is void for uncertainty, and neither the sheriff's advertisement nor his oral testimony is admissible in evidence to show what land was meant to be conveyed. Broughton vs. Birchmore, 18 Am. Decisions, p. 654, and 6 Am. Decisions, p. 666.

Another fatal objection to the admission of this tax deed to Sanders is that Walls was estopped, either by a deed or mortgage to Endel, from setting up an outstanding title, he being Endel's grantor under a warranty deed. Barber vs. Harris, 15 Wend., 615.

In conclusion: This court ruled that "where, upon a general view of the case, giving the appellant every fair construction of the facts in his favor, an application of the principles of law controlling the matters involved justifies the judgment, it must be affirmed. Spratt vs. Price, 18 Fla., 289.

THE CHIEF-JUSTICE delivered the opinion of the court.

The first and material question in this case is whether in an action of ejectment a "plea on equitable grounds" is appropriate and should be allowed; whether under the first equitable plea interposed in this case, viz: that the appar-

---

---

Walls v. Endel et al.—Opinion of Court.

---

---

ent legal title of the plaintiff was a deed absolute in form, but in fact was executed to secure the indebtedness of the grantor to the grantees, and was in equity a mortgage.

Our statute enacts a recognized rule of equity, that all deeds of conveyance conveying or selling the property for the purpose or with the intention of securing the payment of money shall be deemed and held as mortgages and shall be subject to the same rules of foreclosure and the same regulations and restrictions as now are or may hereafter be prescribed by law in relation to mortgages. Act January 30, 1838.

In 1853, Chapter 525, this was re-enacted with a further provision, that in no case shall the right of possession of the property by the mortgagee be recognized in a court of justice until a due foreclosure according to the forms of law for the foreclosure of mortgages. McC. Dig., 765.

At common law the rule was well settled that in ejectment or any other form of action for the recovery of land it was incompetent to prove by parol that a deed of conveyance in fee was intended by the parties to be a mortgage or held as a security for money. Webb vs. Rice, 6 Hill, N. Y., 219. Though it might be shown by parol in equity. 4 Kent's Comm., 142, and authorities cited.

By section 69 of "an act to amend the pleading and practice in this State," approved February 8, 1861, it was enacted that the defendant in any cause in any court, in which if judgment were obtained he would be entitled to relief against such judgment on equitable grounds, might plead the facts which entitle him to such relief by way of defence: *Provided*, Such plea shall begin with the words, "for defence on equitable grounds," or words to the like effect.

Would the defendant, if he had not made such plea, and judgment had gone against him upon the issue of law, be

---

---

Walls v. Endel et al.—Opinion of Court.

---

---

entitled upon the facts pleaded by him to relief against such judgment, by bill in equity and injunction?

In *Petty vs. Mays*, 19 Fla., 652, it is said that “an equitable right which might be available in equity cannot avail the defendant in ejectment as against the legal title.” The plea in that case was “not guilty” only. The question of pleading an equitable defence was not raised. What was said was in reference to the legal defence pleaded.

This plea, though not artificially drawn, alleges that the plaintiffs’ right, though in form a deed absolute, yet that it was given as a security for indebtedness and advances to be made by plaintiffs to defendant to carry on his business, that he objected to it in that form, but was told by plaintiffs that “all they wanted was security,” and would give defendant “a paper writing back, which they did” the next day, and defendants have remained in possession of the premises, and the plaintiffs have only a mortgage interest, if any, in the property, under the circumstances stated.

If these circumstances were alleged in a bill to enjoin the judgment mentioned and proved, such judgment certainly ought to be enjoined because the result of these facts is that the deed was given to secure the payment of money, and is therefore, by the rules of equity, only a mortgage, and the statute we have cited declares it to be a specific lien, and that the holder cannot have possession without due foreclosure, decree and sale; while the judgment at law would give possession without foreclosure and sale.

A plainer case for equitable relief can scarcely be imagined. If the plaintiff has only a specific lien on the property, though it is in form of a deed in fee, it is not only inequitable but contrary to the plain words of the statute that he should obtain possession otherwise than by due foreclosure of the mortgage interest.

Any fact which clearly proves it to be against conscience

---

---

Walls v. Endel et al.—Opinion of Court.

---

---

to execute a judgment at law, of which the complainant could not have availed himself in a court of law, will induce a court of equity to enjoin the judgment. *Marine Ins. Co. vs. Hodgson*, 7 Cr., 332; 1 Story's Eq. Jur., §887.

The Codes of New York, Wisconsin and other States allow equitable defences in suits elsewhere denominated remedies or actions at law, and they are held to include actions of ejectment. Our statute allows the defence on equitable grounds in any cause, in any court, in which the defendant would be entitled to relief against the judgment if obtained at law. Necessarily the courts to give effect to the statute must admit under the equitable plea such evidence as could be received to establish the facts if they were alleged in a bill in equity. In *Despard vs. Walbridge*, 15 N. Y., 374, 378, the court say, "that since the enactment of the Code of Procedure a defendant may avail himself of an equitable as well as legal defence in all cases, whatever may be the nature of the action, there would seem to be but little room for doubt," citing *Dobson vs. Pearce*, 12 N. Y., 156; *Crary vs. Goodman*, id., 266. "That a deed absolute on its face was intended as a mortgage, would, before the Code, have been an equitable defence, because it could not have been proved at law. In order that it should now be made available in legal action, as provided by the Code, the evidence to establish it must be admitted in that class of actions."

In *Kent vs. Agard*, 24 Wis., 378, it is said "the plaintiff should have been allowed to show by parol that the absolute deed was intended as a mere security and was consequently only a mortgage. That this may be done in some form of action is not contested. And I see no reason why it may not be done in an action to recover the possession of real estate. When the facts are proved such deed is a mortgage only, both in law and in equity. The rights of the

---

---

Walls v. Endel et al.—Opinion of Court.

---

---

mortgagor and mortgagee are precisely the same as though the defeasance were contained in the deed itself. The only difference is in the manner of proving the defeasance." And see *Murray vs. Walker*, 31 N. Y., 399; *Brick vs. Brick*, 98 U. S., (8 Otto) 514.

"The doctrine is that such evidence is not received to contradict an instrument of writing, but to prove an equity superior thereto." *Saunders vs. Stewart*, 7 Nev., 200.

There is no apparent difficulty in arriving at the justice of the case by a trial of the facts under this plea in ejectment, for if it be shown to the satisfaction of the jury that the deed was intended at the time it was executed to be a security for the payment of money due or to become due, or to secure advances to be made by the creditor, they must find for the defendant upon that deed; and the creditor's remedy must be to enforce his claim by a foreclosure of the lien.

We therefore conclude that the court erred in striking out the first "plea on equitable grounds." The second equitable plea does not show a defence at law or in equity. It does not allege performance.

The appellant excepted to the ruling of the court in refusing to receive in evidence the "judgment" of the Circuit Court in the forcible entry and detainer proceedings. The court committed no error in this ruling. The judgment in those proceedings does not conclude the parties in ejectment, either as to the title or the question of mesne profits as damages. And it may be well to remark here that the "record" offered was not a complete record but only a portion of a record. It was not competent evidence. *Stark and Wife vs. Billings*, 15 Fla., 318; *Greenl. Ev.*, §501, *et seq.* The whole record or an authenticated or sworn copy of the whole should be produced. The minutes or portion of the

100  
SUPREME COURT.

---

City of Jacksonville v. Aetna Fire Engine Co.—Syllabus.

---

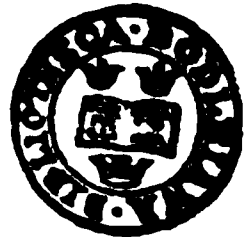
record here produced do not show the subject matter of the suit.

As to the rejection of the tax deed, whatever the object may have been in offering it, the court decided properly. It contained no description of any property which could be identified as the lot in question.

It is unnecessary to notice in detail the numerous assignments of error. What has been said sufficiently covers the whole case.

We suggest that the verdict in this record does not find what estate the plaintiff had in the premises. This is required by the statute. Ch. 3244, Act Feb. 22, 1881; McClellan's Dig., 481. And the judgment must correspond with the verdict in this particular. Ib.

Judgment reversed and new trial granted.



---

THE CITY OF JACKSONVILLE, APPELLANT, VS. THE AETNA  
STEAM FIRE ENGINE COMPANY, APPELLEES.

1. Where the declaration sets up a cause of action enuring jointly to several parties, and it appears upon its face that only some of the joint contractors are plaintiffs, (no death or other fact showing survivorship of the right of action in the plaintiffs being set up,) it is a demurrable defect, and a demurrer of plaintiffs to defendant's pleas in bar should be overruled, whether the pleas in bar set up a good defence or not.
2. No obligation to pay the members of a volunteer association for the extinguishing of fires in a municipal corporation arises or is implied from the simple rendition of such service, and where they claim compensation the burden of proof is upon them to show a contract to that effect.

The evidence in the record of this case is substantially as follows:  
The record of the city covering the matter of the compensation of the Aetna Steam Fire Engine Company clearly discloses a state of



---

---

City of Jacksonville v. Aetna Fire Engine Co.—Syllabus.

---

---

facts and contract which admits a debt by the association to the corporation on the 10th of March, A. D. 1871, and provides for its satisfaction and payment by service to be rendered thereafter, upon terms to be thereafter agreed upon by the city and the company.

A person who was Mayor of the city in 1869, 1870, 1871, 1875 and during other years to 1881, swears that according to his recollection the city assumed the outstanding debt of the company, and took a mortgage on the engine to secure its repayment; that he was Mayor at the time the question of paying the companies came up; that he introduced an ordinance allowing compensation, and that to the best of his recollection it was not passed. No ordinance or contract allowing compensation is shown by the records of the city.

A person who was Clerk of the City Council during the years 1873, 1874 and 1875 swears that during that time the city passed a resolution transferring the engine to the company, the amount due the company under a contract previously made with them and to his term of office to be allowed as payment for the engine, in whole or in part, so far as it would go. The resolution, he swears, was lost while he was Clerk and before he recorded it. The contract, he swears, provided in terms that the city should pay to each of the fire companies twenty-five dollars for each hour they worked at a fire in the city; that he only remembers having seen and read it over; that he does not recollect its date, and that it was lost while he was Clerk: *Held*, That the finding of a referee awarding damages at the rate of \$25 per hour for services rendered from February 12, 1871, to and including July, 1878, for the sum of \$6,900, giving a credit for the admitted debt of the company to the city of \$3,500 on the 12th of March, 1871, is clearly contrary to the evidence, and the only consistent construction of the testimony of the Clerk, with the records of the city and the acts of the parties, is that the contract, to the existence of which he swears, bore date before the 12th of February, A. D., 1871, and was thus controlled by the terms of the subsequent contract of that date, and that such finding of the referee, being clearly contrary to the testimony, should be set aside and a new trial awarded.

The facts of the case are stated in the opinion.

Appeal from the Circuit Court for Duval county.

This case was tried by Mr. Manuel C. Jordan, as referee.

---

City of Jacksonville v. Aetna Fire Engine Co.—Argument of Counsel.

---

*C. P. & J. C. Cooper and John Earl Hartridge for Appellants.*

*T. A. McDonald and A. W. Cockrell for Appellees.*

The referee by whom the case was tried, finds:

1. The contract was made; 2. That it was in the capacity of the city to make such a contract; 3. That the services rendered were worth the amount of judgment, after allowing the city the face of a note due from the appellee to the appellant, introduced in evidence.

The appellants seek to reverse said judgment upon the grounds:

1. The appellee has not proven it is a corporation.

We say the declaration did not allege it was a corporation, nor was a demurrer interposed by appellant on that ground. But as the proof shows the appellant contracted with the appellee, whatever it may be, in the very same capacity in which it sued, the city is estopped from denying the legal existence of the party with whom it made the contract, and is estopped from denying its capacity to sue for a breach of that contract, when an enforcement of that contract or of rights arising from it is sought. 61 Ala., 241, and the cases therein cited; *Angel & Ames on Corporations*, §636; *Eaton vs. Aspinwall*, 19 New York, 119.

This in reply to the argument of counsel for appellant, that appellee *failed* to prove it was a corporation. But suppose the appellee is only an association, or firm composed of certain individuals; then the suggestion is made that all the joint contractors claiming by virtue of the contract, did not join in the suit. We submit, the universal rule is the defendant thus sued must make such an objection "*in limine*," and can do it *alone* by plea in abatement. 10

---

City of Jacksonville v. Aetna Fire Engine Co.—Argument of Counsel.

---

Sergt. and Rawls, 257; Garnett vs. Tiffany, Wyman & Co., Minor, 167.

2. The appellant says the contract declared on was “*ultra vires*.”

This proposition raises the inquiry, can the city of Jacksonville, organized under the general law of Municipal Incorporations, protect itself from fires. If so, then as public duties are commensurate with public powers, *it is its duty to do so*.

Conferring the power on an officer to do such act creates a right in those for whose benefit the power was conferred, and they may insist on the execution of the power *as a duty*. Smith’s Commentaries on Statutes, 595 to 604; 9 Porter’s Rep., 395; 19 Ala., 462.

Section 15 of the incorporation act confers upon the city the power specifically to do certain things, and then, “and to do and perform all such act or acts as they shall deem necessary and best adapted to the improvement and general interest of the city or town.” Equivalent words in the the charter of Birmingham, Ala., “and to do every matter and thing which they may deem necessary for the good order and welfare of said city,” were construed by the Supreme Court of Alabama, in 63 Ala., 355, the court saying, “good government and good order and welfare of a city imply much more than mere preservation of social order, sanitary regulations, and appliances for extinguishing fires \* \* \* are certainly within the purview of good city government.” We do not wish to be understood as affirming that any specific grant of power is necessary to the performance of this very necessary police function. We hold it is inherent in every city government, unless taken away by statute. 1 Dillon Munic. Corp., §94; Robinson vs. City of St. Louis, 28 Mo., 488.

Thus the power and duty of a city to make such a con-

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

tract is established *affirmatively* by appellee. But there is no *presumption* of illegality, or abuse or excess of powers, attaching to the contract of a corporation; "*prima facie*," they are valid, and the burthen of showing invalidity rests on those assailing them. Greene's Brice's *Ultra Vires*, 39-32; 54 Ala., 75.

But, says the appellant, conceding the powers of a city to make such a contract, the evidence thereof can only be found according to the requirements of the by-laws, in the records of its proceedings. Anciently it was held that an action of assumpsit could not be maintained, because a corporation could not contract by parol. But this doctrine is obsolete. 45 Ala., 243; 46 Ala., 411.

Unless restrained by legislative enactments to a specific mode, corporations may contract as a natural person. 62 Ala., 389.

Again, conceding the contract sued on was in contravention of the by-laws, it is submitted, the forum in which this suit was held is not the court to enforce the by-laws of the corporation. The corporation had as much authority to make the contract as it had to make the by-laws. The text books and the adjudications settle this point against the appellants. Angel & Ames on Corporations, §362; 64 Ala., 503.

As to the facts found by the referee, this court in 14 Fla., 644, says: "The report of the findings of fact by the referee, being in the nature of a special verdict, this court will not disturb such findings if supported by evidence, the referee being the judge of the weight of evidence, and credibility of testimony."

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is action of assumpsit by some of the persons com-

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

posing the Association known as Aetna Steam Fire Engine Company against the City of Jacksonville, to recover for services rendered from February 12, A. D. 1871, to the first of August, A. D. 1878, by the persons composing the Aetna Steam Fire Engine Company, in extinguishing fires in the City of Jacksonville, under an alleged contract of the city to pay the company twenty-five dollars per hour for actual service rendered.

The case was tried by a referee and the judgment of the Circuit Court is based upon his findings. The judgment rendered was in the name of the Aetna Steam Fire Company, no mention of the persons composing the company being made in the judgment. The declaration like the judgment is entitled in the name of the Aetna Steam Fire Engine Company, while the plaintiffs in the body of the declaration are alleged to be "Charlie R. Bisbee," twenty-one others who are named in the declaration, "and others," who are associated together under the name of "the Aetna Steam Fire Engine Company, for the purpose of carrying on and conducting the business of extinguishing fires in the City of Jacksonville and vicinity." There is no allegation in the declaration that the company was a corporation, or that any of the "others" composing the company had died since the creation of the alleged contract or that they were in any manner disqualified to sue. Throughout the entire declaration the cause of action is alleged to have accrued to the "plaintiffs," which as a matter of course means the persons constituting the association or company, and not the company distinct from the members composing it.

To this declaration the city interposed five pleas which are stated by the attorneys for the city here to be substantially:

First. That the plaintiffs were not incorporated.

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

Second. That the parties composing the company do not carry on the business of extinguishing fires as alleged, that they are members of a volunteer company, organized as a part of the fire department of the City of Jacksonville, under the ordinances of said city, and that the city “never was indebted” as alleged by plaintiffs.

Third. That the city never promised, as alleged.

Fourth. Is a plea of the general issue to the common counts.

Fifth. Defendant plead, the city ordinances creating the fire department of the city, and in that connection set up the defence of *ultra vires*.

Plaintiff demurred to defendants first and fifth pleas, and joined issue on the second, third and fourth pleas. The demurrer was sustained. After trial by the referee there was a finding upon the merits for the plaintiffs, awarding damages and costs.

From this judgment the city appeals.

We examine first the questions arising upon the demurrer to defendant's first and fifth pleas.

As we subsequently discuss and dispose of this case upon its merits, we deem it unnecessary here to consider the question of the legal sufficiency of these particular pleas, and will only discuss the demurrer in reference to its bearing upon plaintiffs' declaration.

The demurrer here is to defendant's pleas in bar of the action. It reached the plaintiffs' declaration, and whether the pleas were good or bad, if the declaration disclosed demurrable defects the judgment upon the demurrer should have been for the defendant, as even a bad or insufficient plea is a good answer to a bad declaration. *Johnson vs. The Pen. and Per. R. R. Co.*, 16 Fla., 657.

It is certainly unnecessary to refer to adjudicated cases to

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

sustain the proposition that a suit by the members of an unincorporated association should be brought in the name of all the individuals composing the company. Their relation is that of joint contractors. There are some cases of suits in a partnership name in which the courts declare that such a suit presents the case of misnomer of plaintiffs, and that the defect cannot be taken advantage of by a plea of *non est factum*, or like plea, where the contract was in the name of the company, but that it must be taken advantage of by a plea in abatement. Such is the case of Porter vs. Cresson, 10 Sergt. and Rawle, 358, cited by the appellees here. The pleas there were *non est factum* and payment. Plaintiffs had declared on a note as given to Cresson, Wistar & Co., omitting the names of the members of the firm, and suit was brought in that name. On the trial it appeared that the company was composed of four persons, and the defendants requested the court to charge the jury that the plaintiffs were not entitled to recover because all the parties plaintiff were not named in the writ, but the court instructed that the defence was too late, and that the plaintiffs were entitled under the pleadings to a verdict. Upon error this judgment was sustained. Duncan, J., for the court, says: "It is certainly true that in all legal proceedings the parties, plaintiffs and defendant, should be brought by name upon the record, and it is irregular to bring an action for or against a company without naming all the parties. Yet, this is not error, for after a verdict a court will presume A B & Co. to be the real name of the party. There is a case decided, which I am not just able to lay my hands on, in which the widow Moler and her son was considered as the name and cognomen of a party." The court held that under the plea of *non est factum* the issue was not whether this was a bill given to a company, whose names were A B & Co., but

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

whether the defendant did not execute the deed to Cresson, Wistar & Co. The court treats the case as one of misnomer of the plaintiff, and holds that it was to be taken advantage of by a plea in abatement as it would be in a case where "the plaintiff misnames himself." So in the case of *Salisbury et al.*, vs. *Gillett et al.*, 2 Scam., (Ill.,) 290. The action there was debt by "Salisbury & Collins against Gillett & Avery." The plea was *nil debit*. The proof was a note by "Gillett & Avery" to "Salisbury & Collins," and a judgment for the defendants was reversed upon error. The court remarks: "The action is brought in the names of the payees, and if there is anything wrong, it must be in the Christian names of one or both of the plaintiffs. Such a mistake, however, can only be taken advantage of by plea in abatement. Declarations in the firm name were sustained under statutes in *Gordon & Washburn vs. Jenney & Co.*, in 1 Iowa, 182, and in *Abernathy vs. Lattimore, Jenkins & Co.*, 19 Ohio, 288. As to suits of this character, see also the following cases: *Seely vs. Oschenck & Co.*, 1 Pennington, N. J., 75; 3 *Caines*, 170; 2 Penn., (N. J.,) 984; *Tomlinson vs. Burke & Clarke*, 5 Hal., (N. J.,) 295; *Pate vs. Bacon & Co.*, 6 Munt., 219; *Marshal vs. Hill & Henderson*, 8 Yerg., 101. These cases present a variety of judicial opinion upon this subject, both interesting and instructive, and the case in 10 Sergt. and Rawle, is relied upon by the appellee as decisive of this case. We do not think, however, that this case or any of the others mentioned above are applicable to the pleadings here, and for that reason we will not attempt to frame a rule from these inconsistent decisions.

Upon the face of this declaration it appears that there is a joint obligation as to many persons, some of whom are named and others are simply described as "others." The obligation is joint as to all of them, or the survivors of



---

**City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.**

---

them. It appears from the declaration that there were others, joint contractors with the parties named when the contract was made; that these persons, whoever they are, had equal and like rights with the plaintiffs, and there is no allegation showing the names of the other parties or that they have since died, or in any other manner been deprived of a right of action. This appearing upon the face of the declaration a plea in abatement is not necessary to raise the question of its sufficiency. It is unnecessary for the defendant to show by plea in abatement, or in bar, a defect apparent upon the face of the declaration of plaintiffs. If it is a demurrable defect the plaintiffs' demurrer to the defendant's pleas to the action reaches it and the question here is, is this in law a good declaration.

The defect here is not a misnomer of parties, but a non-joinder of parties. The rule as to which, as stated by Chitty and uniformly sustained by the authorities, is that "in all cases of contracts if it appear upon the face of the pleadings that there are other obligees, covenantees or parties to the contract, who ought to be, but are not joined as plaintiffs in the action, it is fatal on demurrer or on motion in arrest of judgment or in error, and if there be a legal ground for omitting to use the name of one or more of the parties as his death, &c., it is necessary to show such excuse for the non-joinder in the declaration." 1 Chitty on Pl., 16; Amer. Ed., asterisk pages 15, 16. Parties in such a situation must join. "The question, who shall be plaintiffs? the law settles for them in the construction of their contract." See cases cited in 1 Chitty, same Ed., asterisk page 10, last portion of note *y*.

The judgment therefore upon plaintiffs' demurrer to defendant's pleas should have been for the defendant, overruling the demurrer. For, as we have stated, even if all of the pleas were bad, a bad or insufficient plea is a good

---

*City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.*

---

answer to a bad or insufficient declaration. For this reason alone we cannot, in view of the law, affirm this judgment. Again, the judgment does not purport to be in the name of the parties composing the company who bring the suit, but in the name of the company itself. The precise effect of this it is unnecessary to determine. What has been said would dispose of this case upon grounds which are technical in the sense that the case would not be decided upon its merits. But upon repeated reviews of the testimony in this record we can find no sufficient proof to sustain this judgment in favor of this company or of a judgment in proper form in a suit brought in a proper manner, in favor of the parties composing the association.

That the service was performed as charged for, we think the evidence establishes. It is shown that a small part of it was rendered outside of the city limits, but this is not embraced in the judgment.

For the plaintiffs, the testimony is substantially as follows:

The first witness, J. J. Holland, swears that he was Foreman of the Aetna Steam Fire Company; that he was present at its organization; proves the constitution and by-laws of the company, and the service rendered. The constitution shows that the company was organized January 8, 1868, but does not show that the organization expected compensation for their labor or service.

Alfred W. Lawson swears that he was the engineer of the company; that the engine was purchased by the company from William Jeffreys & Son, of Pawtucket, R. I.; that the fire company "had a draft from the city for \$2,000 for the purpose of procuring an engine, in part payment, which draft was taken by Mr. Jeffreys; that the draft was, by the City Council, drawn upon themselves, and payable upon demand; that the city refused to pay the draft and it

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

was protested; that the company at the same time paid Mr. Jeffreys \$1,500 of its own money; that a note was signed by Holland and M. L. Hartridge for \$3,500 in place of the \$2,000 note which (the note for \$3,500) was taken up by the city, giving its note for that amount, the company giving the city a mortgage upon the engine for the amount of the note.

W. H. Christy, for the plaintiffs, swears that he was for three successive years City Clerk of the City of Jacksonville. The records of the city show these years to be 1873, 1874 and 1875. He says: "That during the time I was in office the City Council of the City of Jacksonville passed a resolution transferring the Aetna and other engines to the fire companies and the amounts due the fire companies, under a contract previously made with them and to my term of office, to be allowed to them as payment for the engines to the city in whole or in part so far as the same would go. That resolution was lost from the files of the office while I was Clerk and before it was recorded by me. I made diligent search for the same at the request of the members of the fire companies but could never find it. The contract I allude to was also lost. It was never recorded. I saw it in the office while I was Clerk. I made diligent search for the same, while I was Clerk, more than once, at the request of the fire companies but could never find it. The contract provided in terms that the City of Jacksonville should pay to each of the fire companies twenty-five dollars for every hour they worked at a fire in the city. It was made between the fire companies and the city. I don't know what the date of the contract was. I only remember having seen it and reading it over."

James J. Holland swears that he was a member of the City Council of Jacksonville during the year 1875; that at that time the fire engines were levied upon by the United that time the fire engines were levied upon by the United

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

States Marshal to satisfy a debt against the city; that the matter was referred to a special committee of the Council; that the committee reported that the engines were not the property of the city, but belonged to the companies; that upon this report and investigation the engines were released from the levy; that the judgments were against the city for fire apparatus, including these engines.

Jerome C. Andreu swears that he is Clerk of the City Council of Jacksonville, (date of examination August 5, 1882,) and the custodian of the books and the records of the Council. He produces the books from April 24th, 1870, to December 21st, 1874, and from January 11th, 1875, to August 28th, 1879, inclusive. Plaintiffs put in evidence pages 210 to 215 of the record of the proceedings of the Council. It appears from this record that on the 3d of March, A. D. 1871, a resolution was passed by the Council "that the draft given the Friendship Fire Association for \$2,000, and by them transferred to Mr. William Jeffreys in part payment for the Steam Fire Engine Aetna, be taken in by the Council and that another draft or drafts be issued in its place on such time and terms as may be agreed upon by the Mayor and Financial Committee and Mr. Jeffreys." In accordance with this resolution the Mayor and Finance Committee, on the 15th of March, A. D. 1871, reported that they had met, considered the matter and had made the following agreement: "The Steam Fire Engine Company Aetna gives the city their note for \$3,550.70, payable twenty-five years after date or before, on the following conditions: Payment to be made wholly in work with the Steam Fire Engine Aetna at fires upon such terms as may be agreed upon by the company and the City Council, or in lawful money as said company may desire, together with a mortgage on said Steam Fire Engine Aetna, for said amount of \$3,550.70. The company reserving the right to use and control said engine

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

with all the apparatus belonging thereto at all fires in said city and at all other times in a proper manner and in accordance with the laws and ordinances of the city, the city to give Mr. Jeffreys her notes for \$3,550.70, payable at the First National Bank of New York, as follows, to wit: \$550.70, payable June 1, 1871; \$500, payable September 1, 1871; \$500, payable June 1, 1872; \$1,000, payable April 1, 1872, and \$1,000, payable January 1, 1873, all bearing interest at the rate of eight per cent.” Then follows a mortgage from the Steam Fire Engine Company Aetna to the City of Jacksonville. This mortgage covers the engine and apparatus, the company reserving only the right to use and control said engine with all the apparatus belonging thereto at all fires that may occur in said city and at all other times in a proper manner, and in accordance with the laws and ordinances of the City of Jacksonville. The condition of the mortgage is, that if the said company shall and do well and truly pay or cause to be paid unto the City of Jacksonville the amount named in the note (\$3,550.70) according to the terms and conditions thereof, then these presents shall become void, &c. The note given by the company was as follows:

“\$3,550.70.—Twenty-five years after date or before, for value received, the Steam Fire Engine Company Aetna promises to pay the City of Jacksonville, Florida, the sum of thirty-five hundred and fifty dollars and seventy one-hundredths, payment to be made partly or wholly in work with the Steam Fire Engine Aetna at fires, upon such terms as may be agreed upon by the company and the City Council, or in lawful money, as said fire company may desire.”

The report of the committee recommending this settlement of the matters pending between the city and the company was adopted, and a resolution was passed directing the Mayor and Clerk to execute the notes in accordance

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

with the report. The resolution provided that “these notes take the place of any and all drafts heretofore given to said Steam Fire Engine Company Aetna or Friendship Fire Association.” Here follow in the record some proceedings of the City Council in reference to the cancellation of bonds and coupons of the city. The record containing the proceedings of the Council in reference to a suit by Jeffreys against the city follows next in the record. These proceedings narrate that the United States Marshal had consented to receive the amount of a judgment against the city and interest to January 1, 1876, \$2,374.27 in city warrants, upon certain conditions. Further proceedings showing the appropriation of \$2,000 by the city to the same judgment are in evidence. With this the testimony of the plaintiffs concludes.

Peter Jones, for the defence, is sworn. He says that he has resided in Jacksonville about fifteen years; that he has held the position of Mayor of the city six times, first in 1869, 1870, 1871, “and others” to ’81; that he was Mayor in 1875; that according to his recollection the Aetna Steam Fire Engine Company had previously purchased the steam Fire Engine Aetna from Jeffreys & Co., of Pawtucket, Rhode Island; that the city did not purchase the engine; that the company having purchased it had it in their possession, having paid part of the purchase money and gave some notes which were not paid at that time; that the City of Jacksonville assumed the outstanding debt of the company for the engine and took a mortgage on the engine as security. The mortgage before described is identified by this witness as the mortgage given. He says that it is his impression that the city paid the outstanding debt of the company; that the company has always retained possession of the engine, and that so far as he knows “they have not repaid the city the debt paid by the city for them.”

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

This witness swears that he was Mayor at the time the question came up as to paying “the companies of the fire companies” for services to be rendered by them at fires; that he drew up and submitted to the City Council of Jacksonville, as Mayor of said city, an ordinance after the ordinance of the City of Charleston, S. C., applying to their fire department, allowing compensation of so much per hour while on actual duty at fires; that this ordinance was submitted to the Council by him as Mayor, and that to the best of his recollection it was not passed. He states that he cannot say that there was any action taken by the Council on the ordinance; that “it was too far back,” but that so far as he can remember, and according to his remembrance, no positive action was taken, and that to the best of his recollection he never signed such an ordinance.

The printed book containing the ordinances of the city was admitted in evidence, which closed the evidence for the defence.

The charges for services by the company and for which this suit is brought, commence February 12th, 1871, and extend through the years 1871, 1872, 1873, 1874, 1875, 1876, 1877 and to July 28, 1878. The charge made in the bill of particulars is for 276 hours actual labor at \$25 per hour (\$6,900), and the city is credited with \$3,550.70, the amount of the note of the company. The referee finds that the services were rendered as charged for; that for such labor and services the City of Jacksonville had agreed to pay the company a compensation of twenty-five dollars per hour for every hour of actual service rendered by them at fires; that such agreement was made previous to the rendition of any of the services set forth in the declaration; that the company was justly indebted to the city in the sum of \$3,550 for money advanced to, or loaned to said company to pay the amount due as balance of the purchase

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

money due William Jeffreys and found against the city for the sum of \$4,405.22-100, and one hundred and twenty-two dollars costs.

Upon this finding of the referee the judgment of the court was entered, a motion for new trial by the defendant having been previously denied by the referee.

What is the rule of law to be applied to this evidence?

Looking at the testimony in this record, and especially to the ordinances of the city and the constitution of the association, it is apparent that the organizations or associations, whose worthy and commendable purpose is the protection of property in Jacksonville from fire, are volunteer organizations, as distinct from organizations entitled to receive compensation, either from the individual, in whose direct benefit the service results, or from the city, having power under the law of its organization to provide against destruction and loss incident to the ravages of fire. The service shown by this record was not distinctly for the city as a corporation, and while there may have been a duty of some sort resting upon the city to provide means for extinguishing and preventing fires, still the simple fact that A, B or C assisted in protecting or rescuing the property of D, E or F from fire would not result, in the absence of an express contract to that effect, in any obligation of the city to pay any compensation to the party rendering the service, and unless the city promised expressly to pay for the service, it is no more liable than it would be for the construction of gas pipes or the appliances incident to water supply furnished individual residents within the limits of the municipal corporation.

The question therefore as to the power of the city to make the contract claimed to exist in this case, and the other questions of like character which were discussed, do not arise unless such contract is shown to have been made at



---

**City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.**

---

the time alleged, and existed and continued as claimed by plaintiffs.

No obligation to pay the members of a volunteer association for the extinguishment of fires in a municipal corporation arises or is implied from the rendition of such service. The law of their organization, the ordinances of the city, and the constitution of the company, as shown by this record, is that their service is voluntary and without pay, and if they claim compensation the burden of proof is clearly upon them to satisfactorily show a contract to that effect.

The finding of the referee here is that the services rendered by this company were rendered under a contract made with the city before February 12, 1871.

As to the matter of the date of the alleged contract, the only witness who swears that any such contract existed, (and he says that it was lost while he was clerk,) says: "I don't know what the date of the contract was; I only remember having seen it and reading it over." This witness was the Clerk of the Council for the years 1873, 1874 and 1875. He swears simply that it was made previous to his term of office. There is, therefore, not a particle of evidence in this record showing the existence of any such contract anterior to the 12th of February, 1871, as found by the referee. It is upon the testimony of this witness that this finding is for the most part based.

As to the contract and its terms: The testimony of this witness is not to the effect that such a contract continued without modification or adjustment or settlement of accounts between the parties, from the 12th of February, 1871, to July 28th, 1878, as found by the referee. This witness, as will be seen by reference to his testimony, as it appears in the previous portion of this opinion, says that during the time he was in office (1873, 1874, 1875) the city

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

“passed a resolution transferring the Aetna and other engines to the fire companies and the amounts due the fire companies under a contract previously made with them, and to my term of office, to be allowed to them as payment for the engines to the city, in whole or in part, so far as the same would go.”

It may be remarked here that this resolution, which it was the duty of this witness, as clerk, to record and take care of, was (like the contract, to the reading and seeing of which he swears) not recorded, but according to his own testimony “was lost from the files of the office while I was clerk, and before it was recorded, and was never recorded by me.” This witness says that there was some arrangement by which the sums due under this alleged contract were to be allowed as payment for the engines to the city, in whole or in part, so far as the same would go. Now, if there is one thing established by the evidence of both the plaintiffs and defendant, it is that the city did not own these engines, or claim to own them, at any time during the term of office of this witness, (1873, 1874 and 1875,) and the view that there were sums due the city in payment for engines, so far as it involves the idea of ownership by the city at any time, is negatived by the records of the council, by the acts of the company itself, and by the testimony of the person who was Mayor at the time the question of paying “the companies of the fire companies for services to be rendered by them at fires” came up.

Again, as to the matter of this alleged contract anterior to the 12th of February, A. D. 1871: not only do the plaintiffs fail to prove it by the records or files of the corporation; not only is the existence of such a contract continuing from year to year inconsistent with the testimony of the person who was Mayor for the years 1869, 1870 and 1871, the time during which he says the question as to

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

paying the fire companies came up, but it is inconsistent with the provisions of the contract of the 10th of March, 1871, between the company and the city, which appears upon the records of the council, and which plaintiffs, themselves, here introduce in evidence. It appears that before March 1st, 1871, the city gave its draft to this company for \$2,000, upon what account the record does not disclose, except that it was used in payment for the engine. For some reason, which this record does not disclose, the city failed to pay this draft, and it was protested in the hands of William Jeffreys, who had received it of the company in part payment for their engine. On the 3d of March, 1871, the council appointed a committee to take up this draft it had given the company, and substitute others. On the 15th of March, the committee reported that they had made an agreement, the terms of which were that "the Steam Fire Engine Company Aetna gives the city its note for \$3,550.-70, payable twenty-five years after date or before, on the following conditions: Payment to be made wholly in work with the Steam Fire Engine Aetna at fires *upon such terms as may be agreed upon by the company and the City Council*, (italics by the court) or in lawful money as said company may desire, together with a mortgage on said Steam Fire Engine Aetna for said amount of \$3,550.70. The company reserving the right to use and control said engine with all the apparatus belonging thereto at all fires in said city and at all other times in a proper manner and *in accordance with the laws and ordinances of the city.*" (Italics by the court.) Such a mortgage containing these recitals appears upon the records of the City Council, and the note given by the company, for a then admitted indebtedness by it to the city in the sum of \$3,550.70, recites that payment of this sum "to be made partly or wholly in work with the Steam Fire Engine Aetna at fires *upon such terms as may be agreed upon by the*

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

*company and the City Council*, (italics by the court) or in lawful money as said fire company may desire,” and the note was payable “twenty-five years after date or before.” This contract shows an admitted indebtedness of the company to the city upon the 10th of March, A. D. 1871, and that the company was to pay it partly or wholly in work upon terms to be agreed upon by the parties. This contract, the existence of which is admitted, is plainly inconsistent with the then existence of any antecedent contract to be binding upon the parties after the date of this mortgage. The compensation to be paid this company, and which was to be allowed only to the extent of its debt, was by this agreement to be fixed in future. The finding of the referee as to this contract is entirely negatived by this evidence of the plaintiffs, and even if it is admitted that there was such a contract as plaintiffs’ witness, Christy, describes, and which the referee found existed anterior to the date of this note and mortgage, such contract ceased to be effective or of any force after the 10th of March, A. D. 1871, the date of the mortgage recognizing a then present indebtedness by the company to the city in the sum of \$3,550.70-100, and providing a method of its payment within twenty-five years thereafter. Again this mortgage only reserves the right in the company to use and control the engine and apparatus at all fires that may occur in the city and at all other times in a proper manner “and in accordance with the laws and ordinances of the City of Jacksonville,” and the laws and ordinances of the city nowhere provide for the compensation here claimed. They nowhere recognize the existence of fire companies, or a fire department entitled to compensation for services rendered by them. Not only is this true, but the Mayor for the years 1869, 1870, 1871, 1875 “and others to 1881,” swears in effect that to the best of his recollection there was no such contract and that a resolution

---

---

City of Jacksonville v. Aetna Fire Engine Co.—Opinion of Court.

---

---

suggested or offered by him covering the subject was not passed.

After repeated careful examination of this record, the moral conviction left upon our minds is that the relations existing from March 10th, 1871, to the commencement of this suit, are fixed by the contract between the parties, dated March 10th, 1871. Under this the plaintiffs are entitled to compensation looking alone to the discharge of this debt. No existing contract is shown authorizing anything beyond an allowance upon their debt. Plaintiffs are, therefore, entitled to no judgment against the defendant. Nor do we think that this conclusion is necessarily in conflict with the testimony of Christy in this case. He speaks of seeing a contract, but states that he does not remember its date. There may have been such a contract anterior to the 10th of March, A. D. 1871, when there was an adjustment of the matters between the company and the city, but after that it is clear that the relations of these parties are fixed by the contract of that date, which adjusts the then debt of the company to the city, and provides for its payment. Any compensation to be allowed the company under it was to be subsequently agreed upon by the parties, and no compensation beyond the debt is authorized by or consistent with its terms or with the laws and ordinances of the city to which reference is therein made. We think a clear case is made for the defendant by this record.

Judgment reversed, with directions as to proceedings upon the demurrer, and new trial awarded.

---

Singer Manufacturing Company v. Spratt—Opinion of Court.

---

SINGER MANUFACTURING COMPANY, APPELLANT, vs. L. W. SPRATT AND J. C. MARCY, JR., JUSTICE OF PEACE, APPELLEES.

W. A. McLEAN, APPELLANT, vs. L. W. SPRATT ET AL., APPELLEES.

A. B. CAMPBELL, APPELLANT, vs. L. W. SPRATT ET AL., APPELLEES.

1. The dismissal of a rule to show cause why a writ of prohibition should not be granted is a final judgment upon the suggestion filed and the facts therein contained, from which an appeal lies.
2. The power to issue a writ of prohibition as an original proceeding does not belong to the Circuit Courts, and can be issued by them only as ancillary to a jurisdiction already acquired.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

*G. Wheaton Deans* for Appellants.

*John T. & George U. Walker* for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

Each of these cases is based upon the same state of facts. They are appeals from the judgments of the Circuit Court discharging rules to show cause why writs of prohibition should not issue upon the suggestion of the appellant in each case, and dismissing the proceedings.

The appellant in each case filed a suggestion in the Circuit Court setting forth that L. W. Spratt had instituted suit before J. C. Marcy, Jr., a Justice of the Peace, against such defendant (appellant) in *assumpsit*, that the issue before the Justice in each cause "involved the right of possession and title to real estate, that exception and objection was then and there taken to the jurisdiction of the court

---

---

**Singer Manufacturing Company v. Spratt—Opinion of Court.**

---

---

for the reason that the issue involved the right of possession and title to real estate," but the justice overruled the objection and rendered judgment against the several appellants for a sum less than \$100; that the Justice is about to issue execution upon such judgments for the collection thereof; wherefore it is prayed that the writ of prohibition issue to stop the issuing of such execution.

Upon the filing of the suggestion the court made a rule to show cause, and on the day appointed appellee appeared by attorney and moved to discharge the rule upon the insufficiency of the suggestion, which motion was granted and the rule dismissed.

Appellees now move this court to dismiss the appeal on the ground that there is no final judgment, sentence or decree from which an appeal is authorized.

The discharge of the rule to show cause is an end to the proceedings in the Circuit Court, and no further judgment or proceedings can be had in the cause on the part of the relator. As an original proceeding the filing of the suggestion and entry and service of the rule was the commencement of a suit. The discharge of the rule upon the merits of the suggestion was the final judgment of the court against the appellant. The motion to dismiss the appeal was, therefore, denied.

Upon the submission of the appeals it is argued by appellees that the Circuit Court has no jurisdiction to issue the writ of prohibition in these cases.

The Constitution expressly gives to the Supreme Court original jurisdiction of the writ of prohibition. Art. VI., Sec. 5.

Section 8 of the same article gives to the Circuit Courts original jurisdiction in equity, and "in all cases at law in which the demand or value of the property involved exceeds one hundred dollars, and in all cases involving the

---

---

Singer Manufacturing Company v. Spratt—Opinion of Court.

---

---

legality of any tax assessment, toll or municipal fine, and of the action of forcible entry and unlawful detainer, and of actions involving the title or right of possession of real estate. \* \* They shall have appellate jurisdiction of matters pertaining to the probate jurisdiction and the estates and interests of minors in the County Courts and of such other matters as may be provided by law, and final appellate jurisdiction in all civil cases arising in the court of a Justice of the Peace, in which the amount or value of property involved is twenty-five dollars and upwards, and of misdemeanors tried before any Justice's or Mayor's court. The Circuit Courts and Judges shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, habeas corpus, and all writs proper and necessary to the complete exercise of their jurisdiction."

Here we have the jurisdiction of the Circuit Courts and of the Supreme Court sharply defined. The power to issue the writ of prohibition is in clear words given to the Supreme Court as an original proceeding. The Constitution, enumerating what original writs may be issued, omits to name the writ of prohibition as within the power of the Circuit Courts and Judges, but expressly gives the power to issue this writ to the Supreme Court.

The ancient maxim "*inclusio unius est exclusio alterius*" is applicable.

As a writ "necessary to the complete exercise of their jurisdiction," the Circuit Courts may issue a prohibition or any other appropriate writ to protect its jurisdiction in any cause properly before it, but this is ancillary to a jurisdiction already acquired and not an original process by which to obtain jurisdiction. Nor is it within the power of the Legislature to enlarge the jurisdiction so strictly defined.

The reasoning of Chief-Justice Marshall in the leading



---

**Singer Manufacturing Company v. Spratt—Opinion of Court.**

---

case of *Marbury vs. Madison*, 1 Cranch, 137, 174, has great pertinency to the question here. It was urged before that court, that as the original grant of jurisdiction to the Supreme and inferior courts is general, and the clause assigning original jurisdiction to the Supreme Court contains no negative or restrictive words, the power remains in the Legislature to assign original jurisdiction to that court in causes other than those specified in the article. To this the court answers: "If it had been intended to leave it in the discretion of the Legislature to apportion the judicial power between the Supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. \* \* \* If Congress remains at liberty to give this court appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original; and original jurisdiction where the Constitution has declared it shall be appellate; the distribution of jurisdiction, made in the Constitution, is form without substance. Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all. It cannot be presumed that any clause in the Constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it. \* \* \* To enable this court then to issue a mandamus it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction."

The necessary conclusion in the cases at bar is that the Circuit Courts and Judges have no constitutional power to issue the writ of prohibition as an original proceeding.

---

---

Belote v. O'Brian's Administrator—Argument of Counsel.

---

---

The result is that the Circuit Judge committed no error in dismissing the proceedings before him in these cases.

We may remark that the suggestions of the appellants, filed in the Circuit Court, entirely failed to show that the Justice acted without, or exceeded his jurisdiction in either of the causes before him.

The judgment of the Circuit Court in each case is affirmed.

---

CINCINNATI BELOTE, APPELLANT, VS. O'BRIAN'S ADMINISTRATOR, APPELLEE.

1. A bill of particulars attached to the declaration in an action of assumpsit, although sworn to, is in no sense evidence in the cause, nor in any event can it be referred to, to supply a deficiency in the proof on the part of the plaintiff. Its sole object is to inform the defendant of the nature and character of the cause of action, and for what particular items it is brought.
2. The effect of the exceptions to the general rule, as provided in Chapter 1983, Laws 1874, McC. Dig., 518, §24, is not to render a witness incompetent generally, but only incompetent to testify upon certain specified subjects, namely: "transactions and communications." had with the deceased in his life time. Any party may testify to any fact pertinent to the issue, if it does not come within the exceptions as provided in and by the statute.

Appeal from the Circuit Court for Duval county.

The case was tried before Mr. T. A. McDonnell, as Referee.

The facts of the case are stated in the opinion.

*Rhydon M. Call* for Appellant.

The court erred in striking out the testimony of the plaintiff, Cincinnati Belote.

---

**Belote v. O'Brian's Administrator—Argument of Counsel.**

---

The statute under which this motion was made reads thus, "That no party to such action or proceeding \* \* \* shall be examined as a witness in regard to any transaction or communication between such witness and the person at the time of such examination deceased, &c."

The defendant claims that the testimony of the plaintiff was such testimony in regard to a transaction or communication between herself and the deceased as is contemplated by Chapter 1893 of the laws of Florida. The inquiry then is, does this testimony fall within the meaning and intent of this statute?

Mrs. Belote testified that she made medicine similar to that furnished O'Brian, and was familiar with the ingredients and costs of the same, and then testified to the value. The making and delivery of the medicine by Mrs. Belote, and the receipt and promise to pay for the same by O'Brian, having been established previously by the testimony of a third party, to wit: Charles Belote.

In construing this statute, it is necessary for us to arrive at a correct understanding of the intention and purpose of the Legislature in its passage. In arriving at this we are greatly assisted by the decision of this court in the case of Robinson vs. Dibble's Adm'r., 17 Fla., 457. In that case in speaking of this statute, this court says: The purpose of the statute was to enlarge, not to restrict, the competency of the parties as witnesses. It made parties witnesses-in-chief in the cause, except as to certain matters therein mentioned." These exceptions being the transactions and communications between the parties and the decedent. The court continues: "The suppletory oath of the party to the effect mentioned above we do not think makes him a witness in regard to a transaction between himself and the deceased person within the meaning of the statute referred to. Its effect is to prohibit his being a witness-in-chief in

---

---

Belote v. O'Brian's Administrator—Argument of Counsel.

---

---

the cause as to such transaction, &c.” We would not be allowed to establish by the party in interest that she had made the medicine, and had done other things for which compensation is sought, at the request of O'Brian, and that he had received them and promised to pay for the same. This would clearly be contrary to the statute and doing the very thing intended to be prevented by the statute. The intention of the statute, it is apparent, is to protect estates of deceased persons from fraudulent claims and prevent perjury. The claims would be sustained by the oath of the plaintiff alone, and detailing some conversation, or telling of some transaction between the decedent and the plaintiff, occurring in some obscure place or at some time when no one was present except the decedent, and the witness. This statute was certainly not intended to exclude altogether a party in interest from being a witness in the case, but only to prevent the party in interest from being a witness-in-chief to transactions and communications between the decedent and the party. After the chief facts of the case have been established, the fact of the sale and delivery and the promise to pay on the part of the deceased person, there remains only to prove the value of the goods so sold or of the work so done. How are we to prove this? There are two modes. If there is any one familiar with the goods sold or the work done and knows the value of the same, we may prove it by such person. If it is ordinary goods, &c., by a dealer in goods of that character or one familiar with work of the kind done. But in this case the only one knowing the ingredients of the medicines furnished O'Brian is the plaintiff. She being the only one who knows the ingredients is the only one who can testify as to the value of the medicines furnished. If she was a merchant and kept her books herself, notwithstanding that O'Brian was dead, she could be introduced as a witness,

---

---

**Belote v. O'Brian's Administrator—Argument of Counsel.**

---

---

identify her books, testify that the entries were made at the time they purported to have been made, and thus make her books evidence. It would be a hardship, indeed, if, after full proof had been made of the manufacture, sale and delivery of the goods and a receipt and promise to pay, because the value of the article was known only to the plaintiff, and she did not keep a set of books, that she should be left out entirely and not allowed to prove the value of the articles so proved to have been delivered and for the work so proved to have been done and performed. And this was clearly not the intention of the Legislature in the passage of this act. Their intention, it is plainly apparent, is to prevent the party being a witness-in-chief to the transaction or communication, and thus close the door to fraud. But in cases where the only fact, such as the value, remains to be proven, I submit that in such cases the party in interest testifying would occupy the same position as the merchant making his suppletory oath in a case where the opposite party was deceased. There was considerable stress laid on the fact that the plaintiff's testimony was necessary to the case in order to have a judgment rendered against the defendant; and being vitally important, she testified of a transaction between herself and the decedent. If the Legislature had intended to exclude a party altogether from being a witness in a case where the opposite party was deceased the words of the statute would have been entirely different. And if the testimony was not material it would be subject to objection on another ground. It would seem that this court meets any such objection to the testimony by their decision in the case of Robinson vs. Dibble's Administrator referred to above, when they declare the party capable of taking the suppletory oath.

Again in the case under consideration, the plaintiff said not one word of any transaction or communication between

---

---

Belote v. O'Brian's Administrator—Argument of Counsel.

---

---

herself and the deceased, John M. O'Brian. She being present and hearing the testimony of Charles Belote, and being familiar with the ingredients composing the medicines, &c., testified in the case as any one could who hearing the testimony of Charles Belote, and from his testimony knowing the medicine, was able to tell of what ingredients it was composed and of their value. Also of the value of the sewing of an ordinary man. Taking this view the plaintiff did not testify of or concerning any transaction or communication between herself and the deceased whatever, but simply of the value of certain articles proven to have been delivered, with which she was familiar. In this view of the matter I submit that the testimony of the plaintiff should not have been stricken out and that the court committed error in striking the same.

In regard to the other errors assigned they all depend upon the decision of the second assignment, and it would be needlessly consuming the time of this court to consider them.

*James L. Harn* for Appellee.

The testimony of the plaintiff, together with that of her son, Charles Belote, was the only testimony introduced in her behalf at the trial. The testimony of Charles Belote was not conclusive or tended in any way to establish a single allegation contained in the declaration, and unassisted by that of the plaintiff would have been wholly insufficient to support a judgment in her favor. He expressly says that he does not know what the goods alleged to have been furnished to the defendant were worth, nor was he able to testify as to the value of plaintiff's services alleged to have been performed. This of itself would unquestionably show the materiality of the plaintiff's testimony, which, if al-

---

---

**Belote v. O'Brian's Administrator—Argument of Counsel.**

---

---

lowed and properly in, might have proved disastrous to the cause of the defendant. The law as above partially set forth is unequivocal, and in terms emphatically declares that no party to the action or person in interest shall be admitted to testify as to any transaction or communication between such witness and the deceased. Now I submit that an examination of the record in this cause shows that the testimony of the plaintiff was directly in support of a transaction or understanding which may or may not have been had in the life time of O'Brian. Counsel for appellant does not contend that the motion to strike out was an improper one, or that the court would have erred in entertaining it, provided it had been made in what he conceived to be the proper step of the proceedings. He simply maintains that because the evidence was admitted without objection from opposite counsel, he forfeited the right to avail himself of it afterwards, irrespective of the character of the evidence. The law says that such party cannot testify in a cause; this being so, then what purports to be the testimony of the plaintiff could not properly have been considered by the referee even in the absence of the motion to strike out.

In support of this proposition I cite the case of *Mattair et al. vs. Card*, reported in 18 Fla., on page 768, in which this doctrine is firmly supported. Chief Justice Randall, delivering the opinion, says: "It is proper to remark, however, that all the testimony of the defendant as to their transactions or conversations with Alexander before, at the time and after the conveyance and the note and mortgage were executed, is illegal and improper to be considered as evidence of such matters. They are prohibited by law from giving such testimony, Alexander being dead, unless the administrator has testified in relation thereto. All such testimony should be struck out by the court."

---

---

**Belote v. O'Brian's Administrator—Opinion of Court.**

---

---

From this it would seem to be the duty of the court, *ex-officio*, and in the absence of motion from counsel, to expunge from the record and from their consideration all this character of testimony because it is clear from this ruling that the same is not evidence and can carry with it no weight. In further support of the same doctrine I cite the case of Lycurgus G. Stewart, Appellant, vs. Sarah A. Stewart, Appellee, deceased, in January Term, 1883, in which the Chief-Justice, delivering the opinion, lays down the following dictum: "Neither a party to a suit nor his assignee or grantor should be allowed to testify to transactions or communications between such persons and a person deceased, as against an heir at law, legatee or devisee of the deceased, except when the last named persons have testified in respect to the same transaction or communication, and a court of equity will disregard testimony given in violation of this statutory rule, though no objection was made to its introduction." I also cite the case of Tunno vs. Robert, reported in 16 Fla., 750.

The same doctrine is upheld in the case of John S. Sammis, Appellant, vs. L'Engle and Hartridge, Sanderson's Administrators *et al.*, Respondents, decided at the January Term for 1883.

The second ground of error assigned by the counsel for appellant is, that the court erred in striking out said evidence. It being settled that testimony of parties in the category of this plaintiff cannot be treated as evidence, and not susceptible of consideration by the court, then this second ground must necessarily fall for want of support.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an action brought by Cincinnati Belote in the



---

 Belote v. O'Brian's Administrator—Opinion of Court.
 

---

Circuit Court of Duval county against James S. Bell, administrator of the estate of John M. O'Brian, for work done and material for the same furnished to the said O'Brian in his lifetime, to the amount of six hundred and six dollars. Attached to the declaration was a bill of particulars in the shape of an account against the deceased, in the following form:

## ESTATE OF JOHN M. O'BRIAN, TO J. S. BELL, ADMINISTRATOR.

To Mrs. C. Belote:

.DR.

1879. To three bottles of medicine for cough prepared by me each week from June 1st, 1879, to September 12, 1881, (118 weeks) at \$1.00 per bottle.....	\$354.00
To one bottle of bitters each week from June 1st, 1879, to September 12, 1881, (118 weeks) at 50 cents per plaster .....	59.00
To one plaster for chest each week from June 1st, 1879, to September 12, 1881, (118 weeks) at 50 cents per plaster.....	59.00
To one bottle of liniment each week from June 1st, 1879, to September 12, 1881, (118 weeks) at 50 cents per bottle.....	59.00
To making and repairing garments during the time, from June 1st, 1879, to September 12th, 1881.....	25.00
<b>Total .....</b>	<b>\$606.00</b>

This bill of particulars has attached to it the affidavit of C. Belote made on the 12th day of July, 1882, to the effect that "the above account against the estate of John M. O'Brian is due and remains unpaid; that the services charged for in this account were rendered to the deceased at his request, and that the medicines prepared for him and charged against his estate were delivered to and used by the deceased during each and every week between the time from June 1st, 1879, to September 12th, 1881."

The defendant plead that he never was indebted as alleged in the declaration. Issue was duly joined, and the cause was referred to T. A. McDonell, Esq., to hear and determine.

On the 23d of December, 1882, the cause came on for trial

---

---

**Belote v. O'Brian's Administrator—Opinion of Court.**

---

---

before the referee, and the plaintiff was introduced in her own behalf and testified as follows:

"I make medicine for my family similar to that furnished to O'Brian in his lifetime. The cough medicine that I make is of two kinds. One kind costs eighty-three cents per bottle, the other \$1 per bottle. The cost of the ingredients of the liniment was fifty cents per bottle; the cost of the ingredients of the strengthening plaster was fifty cents. The medicines, the cost of which is above stated, are similar to those furnished to O'Brian in his lifetime, and cost the same and are composed of the same ingredients. The sewing for an ordinary man I should charge for fifteen or twenty dollars a year, that is making and repairing garments."

On her cross-examination, she said:

"In one bottle of the cough mixture the following are the ingredients: Icelen moss, cost 5; licorice, 10; gum arabic, 10; anise seed, 10; honey, 25; rum, 13; paregoric, 10. The other kind of cough medicine, the ingredients are as follows: Rum, 50; honey, 25; balm of gilead buds, 10; paregoric, 10; rock candy, 5. The liniment is composed of the following ingredients: Sweet oil, 15; camphor, 10; turpentine, 5; laudanum, 10; hartshorn, 10. The strengthening plaster is composed of roots dug by myself from the ground."

On the 25th day of January, and after the foregoing evidence had been taken, the defendant, by his attorney, moved the court to strike out such testimony of the plaintiff, for the reason that it was improperly admitted, and for the reason that it was incompetent and illegal.

The referee granted the motion, and struck out the testimony. The attorney for the plaintiff duly excepted to such ruling of the referee.

Charles Belote, a son of the plaintiff, was then sworn

---

---

**Belote v. O'Brian's Administrator—Opinion of Court.**

---

---

and testified substantially as follows: I know the plaintiff and knew O'Brian in his lifetime. Defendant was always complaining of a cough; I know the plaintiff made cough medicine, liniment and strengthening plasters for him. She commenced to make these medicines for him in June, 1879, and continued to make them until the time of his death in 1881. Each week three bottles of cough medicine and one strengthening plaster was furnished to John M. O'Brian, sometimes one bottle and sometimes two bottles of liniment each week. During same time plaintiff did the sewing and mending for O'Brian; O'Brian usually came after the medicine, and when he did not come, I carried it to him; I also carried him garments made and repaired by the plaintiff; these things were not paid for by the deceased before his death, nor since by his administrator; the Sunday before he died he said to me, that the medicines were better than any doctor's, and she should be well paid for them; I lived in the house with my mother during the time; she did not render any bill to O'Brian in his lifetime; she bought the ingredients at the drug store; don't know what she charged for the medicines or the plasters; I carried the medicine to O'Brian about as often as he came for it; the medicines were always furnished in bottles holding about a pint, always full.

Robert Grant, a witness for defendant, testified that he knew O'Brian for two years before his death; in the latter part of sickness he was with him constantly; he was in the house with him all the time, and the only medicine he took was tar water, and the application of the pitch plaster; for more than six months before his death the witness began getting pitch plasters for him; witness never knew of plaintiff furnishing medicine and never saw Charles Belote come to the house; witness was there, about daily for six months before O'Brian's death, and if

---

---

Belote v. O'Brian's Administrator—Opinion of Court.

---

---

Charles Belote had brought medicine he would have been likely to have seen him; witness usually gave O'Brian his medicine, and if he had been taking any other kind he certainly would have known it.

Mrs. E. A. Rhame testified that she knew O'Brian since 1879; he came to Florida for his health, troubled with his lungs; he had an aversion to doctors, and wanted to depend upon the climate; the last year of his life she saw him frequently, and for three months before his death saw him two, three and four times a week; two or three weeks before his death, while taking dinner, his cough troubled him; she asked why he did not take some syrup, or something for his cough; he answered it would do him no good; Mr. Arnold furnished him with the tar water, which he took; never heard him speak about Mrs. Belote's furnishing medicine.

Mrs. G. W. Arnold testified: I knew O'Brian since January, 1879; he had lung trouble and came for his health; he boarded with me about two months; he then left and went to his own house about a quarter of a mile from mine; I then saw him frequently, he came in and out quite often; he never had a doctor to attend him; had no faith in them, and preferred me to fix and prepare little simples for him; he told me that Mrs. Belote had offered to furnish him with medicines which would do him good, but he was satisfied all she wanted was his money, and had no faith in her medicine, and did not want any of it; he did not take anything for his lungs, as he told me, and not until the third year did he begin any treatment for his lungs, by taking tar water I furnished him, and using pitch plasters I also furnished him; I know that during six months and longer before his death he took nothing but tar water and used the pitch plasters; he told me he was afraid to take the medicine from Mrs. Belote, and was very suspicious of them

---

**Belote v. O'Brian's Administrator—Opinion of Court.**

---

because she was in with the Hayes who was his enemies, and he was afraid she would poison him. Before Judge Baker, in an examination, I heard the plaintiff say "long for a spell he paid me for the medicines I furnished him, but after we were engaged to be married, which was in April, I made no charge; at the time of his death there were no empty bottles about in which any kind of medicine had been furnished."

The referee found for the defendant and the plaintiff made a motion for a new trial which was denied, and then brought his appeal to this court.

The errors assigned are as follows:

1. In allowing the motion to strike out the testimony of Cincinnati Belote, said motion coming after said testimony was received without objection.

2. In striking out said testimony.

3. The verdict was contrary to the evidence.

4. The verdict was contrary to the law.

5. In denying the motion for a new trial.

Section 1 of Chapter 1893, Laws, reads as follows: "No person offered as a witness in any court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto; *Provided, however,* that no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witnesses and the person at the time of such examination deceased, insane, or lunatic against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person," &c.

This action was brought by Mrs. Belote against the ad-

---

---

**Belote v. O'Brian's Administrator—Opinion of Court.**

---

---

ministrator of O'Brian. Attached to the declaration was a bill of the particulars of her demand amounting to \$606 for medicine furnished and labor done. This bill of particulars is in no sense evidence, nor in any event can it be referred to, to supply any deficiency in the proof on the part of the plaintiff. Its only object is to inform the defendant of the nature and character of the cause of action. The son of the plaintiff was a witness upon the part of the plaintiff. He proves the delivery of medicine, liniment and strengthening plasters to O'Brian, made and furnished by his mother from June 1879, to his death in 1881. He also proves that the plaintiff did the sewing and mending for the deceased during the same time. He says, each week three bottles of cough medicine and one strengthening plaster, sometimes one bottle and sometimes two bottles of liniment each week, was furnished to the deceased O'Brian. That these things were not paid for by O'Brian during his life, nor by the administrator since his death; that the deceased said before he died that his mother should be well paid for them. The value of the medicine, or the work in sewing for the deceased were not proved by this witness. To prove such value, and in order to enable her to recover a judgment, the plaintiff's evidence seemed to be necessary. Without it, the amount in which the estate of O'Brian was indebted to her could not be arrived at by the referee. She testifies in her own behalf that she makes medicine for her own family, similar to that furnished to O'Brian, in his lifetime, and then testifies as to the costs of the medicines, itemizing the expenses of each ingredient of which they were compounded. She also testifies as to the value of services per year, in making and repairing garments for "an ordinary man." These medicines and the making and repairing of such garments, is the cause of action specifically set out in her bill of particulars. There is no other evidence

---

---

**Belote v. O'Brian's Administrator—Opinion of Court.**

---

---

of the value of the services, or the worth of the medicines. Upon motion, this evidence of plaintiff was stricken out by the referee, as being in conflict with the law above cited. Chapter 1983, Laws 1874.

We cannot see that it was so in conflict with that law. She has not testified "in regard to any transaction or communication" between such witness and the deceased O'Brian. Her evidence was only to the value of certain medicines, which she made for her own family, the like of which was furnished (as proved by her son) to O'Brian in his lifetime, and what it was worth to make and repair garments per year. The word "transaction" means "the doing or performing any business, the management of an affair, the adjustment of a dispute between parties by mutual agreement." Certainly, she testified to no such thing, when she only gave the value of certain medicines, compounded of drugs, and the worth of services performed in making and mending garments. There was no "communication" between her and the deceased referred to in her evidence. The value of the articles furnished and the labor performed were wholly independent of any personal transactions or communications between the witness and the deceased person. The effect of the law, or rather the exception to the general rule as prescribed thereby, is not to render a witness incompetent generally, but only incompetent to testify upon certain specific subjects, namely: "transactions and communications" had with the deceased.

Any party may testify to any fact pertinent to the issue, if it does not come within the exception as provided in the statute. This point has been adjudicated and settled in this State. In Robinson vs. Dibble's Admr's. 17 Fla., 457, this court says: "The purpose of the statute was to enlarge, not to restrict the competency of parties as witnesses. It made parties witnesses-in-chief in the causes except as

---

---

Knight et al. v. Weiskopf et al.—Syllabus.

---

---

to certain matters therein mentioned.” See also Raulerson vs. Rockner’s Adm’r, 17 Fla., 809; Sanderson’s Adm’rs vs. Sanderson, Ib., 820.

We think the referee erred in striking out the evidence of Mrs. Belote. As to the question, whether with her evidence, taken in connection with that of her son, and with that of the witnesses for the defendant she would be entitled to a judgment, we have nothing to say. Her evidence should have been considered by the referee, and he was the proper judge of the facts, as well as the credibility of the witnesses.

In the view we have taken of this case it is not necessary to examine the other alleged errors.

The judgment is reversed and a new trial ordered.

---

ALVA A. KNIGHT ET AL., APPELLANTS, VS. H. WEISKOPF ET AL., APPELLEES.

All the defendants to a judgment in ejectment must join in an appeal, or there must be notice and severance.

Appeal from the Circuit Court for Duval county.

The Appellees, who were plaintiffs below, moved to dismiss the appeal on the following ground: “The record shows a joint judgment was rendered in the court below against all the defendants therein, and bond given and appeal therefrom prosecuted in the name of only two of the defendants.” There were three defendants.

*Cockrell & Walker* for the motion.

*M. C. Jordan and John Earl Hartridge, contra.*



---

---

Coker v. Dawkins—Syllabus.

---

---

THE CHIEF-JUSTICE delivered the opinion of the court.

Judgment in ejectment against three defendants, two of whom appeal without notice to the other or severance.

Motion of appellee to dismiss appeal granted.

The appeal must be in the names of all the defendants, or there must be notice to the co-defendants who do not appeal, and severance. Standley vs. Jaffray, 13 Fla., 596, and authorizes cited.

Appeal dismissed.

---

JAMES P. COKER, DEFENDANT AND APPELLANT, vs. DEWITT  
C. DAWKINS, PLAINTIFF AND RESPONDENT.

1. Where a fact alleged in a petition or bill in equity is at issue and is testified to by one witness only, and an equally credible witness positively denies the fact or transaction (he being a party to it), and there is no other evidence bearing upon the fact alleged, it is error to find that the fact is proved in favor of complainant.
2. A *bona fide* purchaser of property at a sheriff's sale is protected by the presumption that the judgment of a competent court has been correctly rendered and that the execution in the hands of the officer has been regularly issued. He may fairly presume that the sheriff has acted in the discharge of official duty according to law.
3. At public sales by auction, there being no fraud or unfairness, as soon as the hammer is struck down the bargain is considered as concluded, and the seller has no right afterward to accept other bids nor the buyer to withdraw from the contract.
4. Equity will not set aside a public sale not tainted with fraud or unfairness, and upon the sole ground of inadequacy of price. Property offered for sale by auction is offered to be sold for what it will bring, and unless the inadequacy of price is so unconscionable as to demonstrate some gross imposition or undue influence a court should not annul the sale.

---

---

Coker v. Dawkins—Statement of Case.

---

---

Appeal from the Circuit Court for Jackson county.

This was a proceeding commenced by D. C. Dawkins in the Circuit Court for Jackson county by petition, which was treated by the parties as a complaint under the Code. The original petition appears to have been filed in November, 1869, and was lost, and in November, 1871, a copy was filed under which the subsequent proceedings were had. The petition is as follows:

Your petitioner, DeWitt C. Dawkins, of the county of Duval and State of Florida, respectfully sheweth unto your Honor that he is and was prior to the first Monday in March, A. D. 1869, the lawful owner of one undivided half interest in certain valuable real estate in the town of **Marianna**, county of Jackson and State of Florida, known and described as lots number thirty-two (32) and thirty-five (35) in the plan of said town.

Your petitioner further represents that on the said first Monday in March, 1869, the same being the first day of the month, one John W. King, then sheriff of said county, exposed said property to sale, and did sell the same to the highest bidder or pretended highest bidder, to satisfy certain executions in his hands against your petitioner and others; one in favor of Marmaduke B. Pender, and another in favor of Martha Pittman, and the said sheriff did then and there sell, or pretend to sell, the said property of your petitioner for said purpose to James P. Coker, for the bid and sum of four hundred and seventy-five (475) dollars, and subsequently made and executed his official deed to said Coker, conveying to him the said property of your petitioner.

Your petitioner further represents and charges that the said sale was fraudulent, wrong and oppressive upon your petitioner, and that all of the aforesaid persons, to wit: John W. King, sheriff, James P. Coker, Marmaduke B.

---

---

Coker v. Dawkins—Statement of Case.

---

---

Pender and Martha Pittman were parties to said fraud and oppression, as the following facts will show, to wit:

1. John W. King, the said sheriff, advertised the said property, if he advertised it all, as I am informed and believe in a newspaper printed at Pensacola, 150 miles or more west and distant from Marianna, where said property was sold, and did not endorse his levy on said executions, or either of them, until the day of sale or afterwards, though dated January 1, 1869, so that your petitioner knew nothing of said advertisements as he at the time resided at least 200 miles east from Marianna, except by mere accident through the instrumentality of a friend, who informed him by letter of the mysterious working too late for equitable remedy, which he would have sought.

2. The execution in favor of Martha Pittman is based upon a "judgment by default" obtained against your petitioner and others, in the Circuit Court of said Jackson county, on the 26th day of October, A. D. 1861, and after the plaintiff in execution, the said Martha Pittman, had on the 1st day of April, A. D. 1861, agreed with your petitioner to dismiss the suit, on which said judgment is based, upon the payment of forty dollars, which was then paid and placed as a credit upon the cause of action by her agent, Thomas M. White, and your petitioner relied upon that promise and agreement, and set up no defence which he otherwise would have done.

3. On the said day of sale, and before the said sale took place, your petitioner offered to said sheriff his affidavit to the effect that the said execution in favor of Martha Pittman was illegally obtained, with a proper bond accompanying said affidavit; but the said sheriff, under the advice and apparent control or influence of the attorney for the plaintiffs in execution then and there present, refused to receive said affidavit and bond, or even to look at it, and it

---

---

Coker v. Dawkins—Statement of Case.

---

---

was impossible under the then existing circumstances to apply for or obtain an injunction to prevent the wrong and injury consequent upon such unjust proceedings.

4. The said property of your petitioner then and there sold for said purpose was reasonably worth at least fifteen hundred dollars and an annual rental value of four hundred and fifty dollars, and it is now worth that much or more.

5. James F. McClellan, the then acting attorney for the several plaintiffs in said executions, I am informed and believe told one or more persons that the said property would not be sold on that day, which had the effect to keep him or them away from said sale, who otherwise would have been present and bid much more for said property than it sold for if permitted to do so.

6. Two different persons, to wit: Ashley B. Hamilton and the said James P. Coker, being then and there present at said sale, both claimed the said bid of four hundred and seventy-five dollars at the same time, and both of said persons claimed the same bid aloud and within the knowledge and hearing of the said sheriff and other persons present, and the said Hamilton then and there aloud and within the hearing and knowledge of the said sheriff proposed that as two persons claimed to have made the said same bid at the same time he would raise the bid to four hundred and eighty dollars, but the said Coker fraudulently and wrongfully persisted that he had bought the property for the said bid, and the said sheriff fraudulently and wrongfully discriminated in favor of the said Coker and against said Hamilton, and greatly to the damage and injury of your petitioner, and the said attorney for the said plaintiffs in execution was present and sanctioned the said fraudulent proceedings.

7. The bidding at said sale was not made aloud or *viva voce*, but for the most part by winking or nodding or other silent

---

**Coker v. Dawkins—Statement of Case.**

---

signals, and when the said bid of four hundred and seventy-five dollars was cried or announced by the said sheriff a gentleman then and there present, and in a tone of voice loud enough to be distinctly heard by said sheriff and other persons, exclaimed "by two," but the said sheriff paid no attention to said exclamation, but quickly knocked off the property to said Coker for said bid and did not dwell a reasonable length of time thereon, which clearly indicates a fraudulent combination between said parties against your petitioner.

8. Your petitioner, after said sale, and on the same day, notified the said sheriff and said James P. Coker that if they persisted in the consummation of said fraudulent sale your petitioner would institute legal proceedings to set aside said sale and for damages for the wrong, but they disregarded said notice, and the said sheriff on the ——day of March, A. D., 1869, made and executed his official deed conveying said property to said Coker, which the said Coker accepted and took possession of said property thereunder against the consent of your petitioner, and still retain possession thereof against his consent.

Your petitioner further represents that he has been greatly inconvenienced in consequence of said wrongful proceedings and has sustained a loss and damages not less than fifteen hundred dollars, exclusive of the value of said property.

Whereupon your petitioner prays your Honor that by order, judgment or decree of this honorable court the said sheriff's sale be set aside; that the said sheriff's deed to said Coker be declared null and void; that the said judgment and execution in favor of said Martha Pittman be declared void; that your petitioner recover possession of said property sold by said sheriff to said Coker, and damages in the sum of fifteen hundred dollars, with interest from the date

---

---

Coker v. Dawkins—Statement of Case.

---

---

of this petition, and such other and further relief as to your Honor may seem just, and your petitioner will ever pray, &c.

No process appears to have been issued or notice served on any of the persons named in the petition, but in November, 1873, an answer was filed by James P. Coker in his own behalf.

The answer of Coker is as follows:

1st. He admits that Dawkins owned the property in question prior to said sale.

2d. That said property was sold to the highest bidder by the sheriff under certain executions held by him against petitioner, Dawkins, as alleged, and was bought by respondent for \$475.

3d. He denies positively any and all fraud in said sale and purchase by himself or any other person within his knowledge or belief.

4th. He is informed and believes the sale was advertised in Pensacola, and that the law so required; has no knowledge of how judgment was obtained, and knew nothing of Dawkins offering sheriff affidavit of the illegality of such execution.

5th. Denies that property sold was worth \$1,500.

6th. Denies, upon information and belief, that J. F. McClellan told any one that the property would not be sold on that day.

7th. That he purchased said property at the said sheriff's sale for \$475 fairly and free from any fraud. That Hamilton had been bidding, but at the time, was not paying attention; that sheriff cried the bid deliberately and gave fair warning that if bid was not raised the property would be knocked down, and announcing in reply to a question on the subject that it was Colonel Coker's bid before he knocked it down; did object to putting up property a second time as he had purchased it fairly.

---

---

Coker v. Dawkins—Argument of Counsel.

---

---

8th. Dawkins did not notify him as alleged in petition he would institute legal proceedings to set aside the sale.

9th. That since his purchase he has expended about \$600 on said property; denies that Dawkins has been damaged as alleged.

The petitioner filed a demurrer and replication to respondent's answer, and after the taking of testimony upon the issues made the court, on 21st March, 1876, rendered its decree that the sale ought to be set aside, and appointing a referee to state an account of rents received by Coker; what he had expended for repairs, purchase money, &c. This decree could not, from its items, be made effective until the coming in and confirmation of the referee's report, and afterwards, in June, 1882, the court confirming the referee's report in part made final decree, that Coker pay the petitioner \$105 due him according to the report, setting aside said sale, declaring the said sheriff's deed null and void, and delivering the property to petitioner; from which decree the respondent has taken this appeal.

*J. F. McClellan and J. E. Yonge* for Appellant.

*J. T. Bernard and D. L. McKinnon* for Respondent.

I. As to the first assignment of error. The court below decreed that Martha Pittman received from the petitioner the sum of forty dollars, and in consideration thereof agreed to discontinue said action. This conclusion says the appellant is not justified by any of the testimony. The petitioner, under oath, stated the above fact. He reiterated it in his testimony. A party cannot be charged against his own denial, in his answer under oath, on the testimony of only a single witness. It must, to warrant a decree, be contradicted *by at last two or three witnesses*, or by written documents. *White vs. Walker*, 5 Fla., 479 and 2 Story Eq.

---

---

Coker v. Dawkins—Argument of Counsel.

---

---

Jur., 1528; Greenl. 1, §260; Carr vs. Thomas and Drum-right, 18 Fla., 736; and various authorities cited on page 491 in White vs. Walker. The statements of petitioner were not rebutted even by one witness; it was not even traversed. It is true that the agent of Mrs. Pittman stated that he had no recollection of having but one transaction with the petitioner, but he was questioned relative to a subsequent one, and not the transaction under consideration. Mrs. Pittman was not examined and the sworn statement was not rebutted by a single witness; and even the evidence of *one* is not sufficient.

II. When a sale is made to satisfy two executions, and one of them is void, the whole sale is void, especially when the judgment creditors of the valid execution and the purchaser had notice thereof. Knight vs. Applegate Heirs, 3 Mon., 336; also 7 J. J. Marshall, 625. The evidence is that the petitioner made affidavit on the day of sale of the illegality of one of the executions, and offered to give bond for a stay, to test the illegality. This was done *publicly*, and was due notice to all the parties, besides openly protesting against the sale.

III. The sale was made upon an execution issued upon a judgment obtained in violation of an express agreement to the contrary, and without the knowledge of the petitioner. This is sustained in reply to the first assignment of error, and the authorities there cited are applicable to this. The sworn petition and the testimony of the petitioner must be rebutted by two witnesses. The court below in its opinion gives its reasons for coming to this conclusion.

IV. The defendant's property cannot be needlessly sacrificed. It is in testimony that Hamilton offered to give more after the sheriff had declared Coker to be the highest bidder. Inadequacy of price and other considerations will set aside a sale. Ryman vs. Nicholson, 2 Yeates, 516;



---

---

**Coker v. Dawkins—Opinion of Court.**

---

---

Nesbitt vs. Dullman, 7 Gill. and John., 512; 3 Marsh, 515; 3 Munro, 373; 3 Litt., 128; 7 Munro, 617; Mobile Cotton Brokers vs. Moore & Magee, 9 Porter, 679.

V. The fifth and sixth assignment of errors are answered in the preceding. If the execution was illegal the sale was void as shown in II. If the sale was void then the court had power to order that the deed made by the sheriff to Coker should be cancelled and delivered up by the said Coker. To order this done was the prerogative of the court, which under the code had the powers of a court of chancery. Story Eq., Vol. 2, §692 to 703.

THE CHIEF JUSTICE delivered the opinion of the court.

The appellant assigns for error the finding of the court, that petitioner had, before judgment was recovered by Mrs. Pittman, paid her or her agent forty dollars, in consideration of which she agreed to dismiss the suit she had commenced against him, and that for her omission to dismiss the suit and taking judgment, the execution was illegal and void.

Assuming that the facts alleged in the petition are material in this proceeding against the purchaser to set aside the sale and the deed, and the material facts being at issue by the answer, we will examine the testimony.

Mr. Dawkins, petitioner, testifies as follows: "The judgment in favor of Mrs. Pittman was obtained in a suit brought against the petitioner and one or more co-defendants, John E. Moseley being one of them. After said suit was brought the said Moseley handed me forty dollars to be paid to Mrs. Pittman upon the condition, solely, that said suit be dismissed. I saw Mr. T. M. White, who, acting as agent for Mrs. Pittman, received the forty dollars and placed the same as a credit on the cause of action in said

---

---

Coker v. Dawkins—Opinion of Court.

---

---

suit, expressly agreeing to dismiss said suit, and expressly promising to instruct Mr. Jesse Norwood, the plaintiff's attorney therein, to dismiss said suit. This was before the return day. Mrs. Pittman acquiesced in the transaction. There was no appearance in consequence of said agreement and judgment by default was taken, of which the petitioner had no knowledge or information until he had notice of the said sheriff's sale. The said suit was not defended, presuming it was dismissed."

This is all the testimony on the part of petitioner upon this branch of the case.

On the part of the appellant, Coker, Thomas M. White, being sworn, was asked, "Did or did not D. C. Dawkins, in 1863 or 1864, pay you any money as the agent of Martha Pittman, upon a note then in suit in the Circuit Court of Jackson county, against D. C. Dawkins, Moseley and others? If yea, state if you, as the agent of Martha Pittman, consented and agreed to dismiss said suit? Did you, at any time, agree with D. C. Dawkins to dismiss a suit pending in the Circuit Court of Jackson county by Martha Pittman against said Dawkins and others, or where said Dawkins was a party defendant"?

Answer. "I do not remember that he did. Mrs. Pittman hired to Dawkins about that time a negro, and the negro was taken before the year was out, and this I believe was allowed as a credit on the note, and this is the only transaction that I ever had with Dawkins relative to Mrs. Pittman's business. I made no agreement as I recollect. I did not agree to dismiss any suit, having no authority to do so."

There was no cross-examination of Mr. White on this subject, and this is the whole testimony upon the point.

Neither the execution nor the judgment against the petitioner in favor of Mrs. Myrick, nor the note or other cause

---

---

Coker v. Dawkins—Opinion of Court.

---

---

of action which was the basis of the judgment, were in evidence, nor the amount of either of them shown in any way. We infer that the claim which entered into the judgment was more than forty dollars, because Mr. Dawkins testifies that the forty dollars was “placed as a *credit on the cause of action* in that suit.” Mr. Dawkins does not show that the forty dollars so claimed to have been paid was not credited to him in entering the judgment, nor that the judgment was for any sum of money not due from him; nor does he say that he had any defence to the action. In the absence of proof to the contrary we must presume that the judgment was regular and in due form, and that the execution was regularly issued upon the judgment.

After eight or ten years from the entry of the judgment, when the execution is about to be enforced, the defendant, who is an attorney in the same court, is surprised to find that a judgment was entered against him, and now on filing his petition to set aside the sale upon the ground of the alleged agreement not to enter a judgment, and after twelve years of litigation, under the petition, fails to prove the agreement except by the testimony of one witness who is positively contradicted by the person with whom it is alleged the agreement was made, and there is no testimony whatever to show even that he was the agent of Mrs. Pittman for any such purpose. The allegation, therefore, that the judgment was entered in violation of the alleged agreement is not proved, and it was error to find otherwise.

In the petition it is alleged that on the day of the sale, and before it was made, the petitioner tendered to the sheriff an affidavit that the execution “was illegally obtained, with a proper bond accompanying said affidavit,” to which the sheriff paid no attention and proceeded with the sale. This is supposed to have reference to the provisions of the act of 1834, (McClellan, p. 524,) which authorizes the party

---

---

Coker v. Dawkins—Opinion of Court.

---

---

to tender to the sheriff an affidavit of illegality of an execution, "stating the cause of such illegality." and giving bond, &c. Whether the affidavit and bond were such as the law requires is not shown, as the record does not give a copy, nor are the contents stated. We cannot, therefore, say that it was the duty of the sheriff to stop proceedings under the execution.

A *bona fide* purchaser at a sheriff's sale is protected by the presumption that the judgment of a competent court of record has been correctly rendered and that the execution in the hands of the officer has been regularly issued. He may fairly presume that the sheriff in the discharge of his duties has acted according to law. *Givan vs. Doe*, 5 Blackf., 260; *Coriell vs. Ham.*, 4 Greene, Iowa, 455; and see authorities cited by the court in *Newton's Heirs vs. State Bank*, 22 Ark., 19, 28.

It is further alleged for error that the court found and decreed that the property was not fairly sold to Coker.

The testimony shows that the petitioner and Coker and a considerable number of other persons were present at the sale, that the property was offered for sale and Coker and one Hamilton bid for it. A bid was finally made of \$475, and after crying this bid for some time Coker inquired whether that was his bid, and it was announced by the sheriff in a loud voice that it was Coker's bid; Hamilton, who had been conferring aside with Dawkins, then inquired whose bid it was, and the sheriff informed him it was Colonel Coker's bid. After crying the bid for some time longer, and no other bid being made, the sheriff struck down the hammer, (having first announced "going," "last call," &c.,) and proclaimed the property sold to Colonel Coker. Immediately Hamilton said he thought it was his own bid and demanded that the bidding be resumed, offering to bid five dollars more; but Coker objected, claiming

---

---

Coker v. Dawkins—Opinion of Court.

---

---

the property, and stating his readiness to pay the money. After some parleying the sheriff concluded he had no right to open the sale and so declared. He then executed a deed to Coker and received the money. There is testimony that when the \$475 bid was made some person said "by two," or "\$475 by two," but it does not appear that the sheriff heard it, nor does it appear clearly that Hamilton claimed the bid until after the property was knocked down to Coker, although he was informed before the close of the sale that it was Coker's bid.

This is the effect of all the testimony on this subject as we understand it.

We fail to discover any evidence of partisanship or unfairness in conducting the sale. If Hamilton bid the same amount as Coker he should have claimed the bid or raised it when informed that it was Coker's bid and before the sale to Coker was cried by the sheriff, as it appears he had abundant opportunity to do so. His offer afterwards to raise the bid five dollars was not of sufficient importance to raise a presumption of unfairness on the part of the sheriff. Neither was there anything in the conduct of Colonel Coker showing any unfairness on his part or tending to prevent a fair sale or to prevent competition in bidding. For aught that appears here he is a *bona fide* purchaser.

The sale was completed so far as the bidding was concerned, and if there was no unfairness on the part of the sheriff or the parties or bidders, the purchaser had a right to insist upon the bargain. "As soon as the hammer is struck down the bargain is considered as concluded, and the seller has no right afterwards to accept a higher bid, nor the buyer to withdraw from the contract." Blossom vs. R. R. Co., 3 Wallace, 196, 206; citing Story on Sales, §461; Rutledge vs. Grant, 4 Bingham, 653; Cook vs. Oxley, 3 Tenn., 654; Adams vs. Lindsell, 1 B. & Ald., 681.

---

---

*Coker v. Dawkins—Opinion of Court.*

---

---

It is alleged in the petition that the sale was advertised at Pensacola, two hundred miles from place of sale. The defendant, Coker, answers that he is informed that this is true, but says that the law required the sale to be advertised in a paper printed at Pensacola. There is no proof on the subject. The petitioner was present at the sale and made no objection to it on the ground of want or regularity of notice.

It is charged in petition that persons were deterred from attending and bidding at the sale by the fact that Colonel McClellan, the attorney for plaintiffs in the executions, informed them on the morning of the sale day that there would be no sale. It is but just to Colonel McClellan to give his testimony on this matter. He says that on the morning of the sale Mr. Dawkins told him that he had arranged the executions of Barnett, Pender and Myrick, and that there would be no sale, and Colonel McClellan mentioned this to some persons. "An hour later he ascertained that this statement of Dawkins was incorrect. I met him and told him he was laboring under a mistake as to having arranged the executions. He then pulled out an affidavit and bond in regard to the Pittman execution." If any were kept away from the sale from the course stated it was not the fault of Colonel McClellan.

Another ground on which the sale was set aside by the Chancellor was the inadequacy of price for which the lots were sold.

The testimony of various witnesses is that the property was worth \$750 to \$1300, and that the selling value of it was much affected by the facts that the property was much out of repair, and that there was a legal controversy pending in regard to the title. The attitude of Mr. Dawkins also in forbidding the sale and threatening legal proceed-

---

---

Coker v. Dawkins—Opinion of Court.

---

---

ings to set it aside had some influence in the opinion of some witnesses.

“Inadequacy of consideration is not, of itself, a distinct principle of relief in equity. The common law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle. The value of a thing is what it will produce, and admits no precise standard. \* \* \* If courts of equity were to unravel all these transactions they would throw everything into confusion and set afloat the contracts of mankind. Such a consequence would, of itself, be sufficient to show the inconvenience and impracticability, if not the injustice, of adopting the doctrine that mere inadequacy of consideration should form a distinct ground for relief.”

1 Story's Eq., Jur., §245; Erwin vs. Parham, 12 How., U. S., 197, 206; White vs. Duncan, 7 Ves. Jr., 34; Livingston vs. Byrne, 11 Johns., 557, 566; Hardy vs. Heard, 15 Ark., 189; Williamson vs. Dale, 2 Johns. Ch., 272; Roe vs. Ross, 2 Ind., 99; Newton's Heirs vs. Bank, 22 Ark., 19.

In Livingston vs. Byrne, Yates, J., says: A sale made at auction and under process of law ought not to be invalidated for mere inadequacy of price, without other circumstances to justify it. It is necessary to secure proper confidence on the part of the purchasers at sales of this description, and to render titles, if fairly obtained, certain and not liable to be impeached by various opinions as to value.

The rule that a sale will be set aside, or confirmation of it by a specific performance refused, on account that the inadequacy of price was so great as to give the character of hardship, unreasonableness and inequality applies only to private sales, and not to sales at public auction. Benton vs. Shreeve, 4 Ind., 66, 70.

Relying upon the foregoing and other authorities we deem it to be established doctrine that equity will not

---

---

Coker v. Dawkins—Opinion of Court.

---

---

set aside a public sale, not tainted with fraud or unfairness, and upon the sole ground of inadequacy of price. In the language of Lord Eldon in *White vs. Damon*, 7 Ves., 35, "The plaintiff is not affected with anything beyond suspicion; the sale taking place at an auction, without any fraud, surprise or mistake; the estate being offered at any price he would bid; and without more he became the purchaser. I am inclined to say, that a sale by auction, there being no fraud, surprise, &c., cannot be set aside for mere inadequacy of price." In that case the property worth over £2,000 had been sold for about £1,000. And see 10 Ves. Jr., 474.

Still in cases of inadequacy of price it has been said that the inadequacy may be so unconscionable as to *demonstrate* some gross imposition or undue influence, and in such cases courts of equity ought to interfere upon the satisfactory ground of fraud. 1 Story's Eq. Jur., §246.

This is not such a case. We have examined all of the authorities cited by respondent in his brief and many others, but we find no case where the rule is laid down otherwise than as above stated by Lord Eldon, and followed by the American courts.

The final decree is based upon the interlocutory findings of fact and application of law by the court in 1876. Assuming that finding and judgment to be correct the final decree of 1882, setting aside the sale, was its natural sequence. Finding, however, that the interlocutory decree was wrong the final decree must be reversed.

The final decree and the interlocutory decree are reversed, and the cause remanded with directions that the petition upon which these proceedings have been had be dismissed with costs.



---

---

Gainer et al. v. Russ—Opinion of Court.

---

---

LUCINDA GAINER ET AL., APPELLANTS, VS. JOSEPH W.  
RUSS, APPELLEE.

1. Parties owing debts and threatened with suit, who are entitled as heirs at law to real estate of the value of \$1,500 from the estate of their father who died possessed also of personal property worth over \$1,000, before judgment recovered against them convey to a relative also an heir the real estate in consideration of her promise to pay the debts owing by their father amounting to about \$200; and one of the judgment debtors sues out letters of administration of the estate of the deceased and as such takes possession of the personal property: *Held*, Upon creditor's bill, that the conveyance of the real estate under the circumstances was fraudulent and void as against the judgment creditor.
2. The mere denial in an answer of a fraudulent intent in conveying property beyond the reach of an execution against them, while admitting all the facts which in law and equity constitute a fraudulent conveyance, is not such a denial as must be overcome by the testimony of several witnesses or equivalent evidence. Such denial must relate to facts charged and not to the conclusions and arguments flowing from the facts.
3. A decree under a creditor's bill directing the sale of the interest of certain heirs at law in real estate to satisfy a judgment against them, which real estate the heirs had conveyed for the purpose of hindering and delaying their creditor, does not interrupt the due administration of the estate by an administrator.

Appeal from the Circuit Court for Jackson county.

The facts of the case are stated in the opinion.

*D. L. McKinnon* for Appellants.

*J. F. McClellan* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

This is an ordinary creditors' bill. Russ held the note of the defendants, W. G. E. Gainer, James Y. Gainer and Lucinda Gainer for \$755.61, dated January 1, 1880, paya-

---

---

Gainer et al. v. Russ—Opinion of Court.

---

---

ble one day after date. The bill alleges that in December, 1880, the complainant pressed the makers for payment but they paid nothing. That on December 29, 1880, the makers of the note conveyed by deed to Lucretia A. Alderman, the wife of Robert J. Alderman, nine hundred and twenty acres of land in Jackson county for the nominal consideration of seven hundred and fifty dollars, but that in fact nothing was paid. In January, 1881, suit was brought against the makers of the note, and in April final judgment was taken against them for \$831.64 and costs, which remains unsatisfied.

The defendants, W. G. E. Gainer, James Y. Gainer and Lucretia A. Alderman, were the children and heirs at law of James W. Gainer, who died in 1878, and Lucinda Gainer was his widow. At the time of his death he was seized and possessed of the land mentioned worth, as alleged, fifteen hundred dollars, and of oxen, hogs, mules, horses and other cattle, and of farming implements, all of the value of about one thousand dollars. In February, 1881, Lucinda, the widow, sued out letters of administration upon the estate of her husband. The debts owing by the deceased were about two hundred dollars. The bill alleges that nothing was paid or to be paid by Mrs. Alderman or her husband to the defendants for the conveyance of their interest in the land, but that it was agreed between them that Alderman and his wife in consideration of the conveyance should pay off the debts owing by the deceased. The grantors remain in possession of the land, and they have no visible property upon which complainant can levy to satisfy his execution, the personal estate being in the hands of the administratrix.

The bill charges that the personal estate is ample to pay off all the debts of the deceased, and that the pretended sale and conveyance was made to hinder and delay com-

---

---

Gainer et al. v. Russ—Opinion of Court.

---

---

plainant in the collection of his judgment and was fraudulent and void. He prays that the conveyance be declared fraudulent and set aside, and that the interest of Lucinda, William G. E. and James Y. Gainer, the judgment debtors, in the land be sold, and the proceeds applied to the payment of the judgment.

The defendants demurred to the bill for want of equity; that it is multifarious; that it joins an administratrix in a bill to set aside a deed to which she was not a party as administratrix, and that it seeks to enjoin an administratrix from discharging her duty as such.

The demurrer was overruled.

Defendants then filed a plea alleging that complainant, before obtaining his judgment, attached and levied upon the lands described and a large portion of the personal property belonging to the estate of James W. Gainer, and also "garnisheed" Alderman and his wife, and upon the trial of said attachment and garnishment a judgment was rendered against complainant.

This plea was overruled.

Defendants then answered admitting all the facts charged in the bill, but deny the fraud or intent to defraud. They say they were prompted to convey the land to Lucretia A. Alderman to save the personal estate which they considered of more value to them than the land, Mrs. Alderman agreeing that in consideration of the conveyance to her she would pay off all the debts chargeable against the estate of James W. Gainer, deceased. Annexed to the answer is a schedule of claims against the estate, paid or to be paid by Mrs. Alderman, amounting to about two hundred and twenty dollars.

One witness only was examined. The complainant introduced George A. Baltzell, who testified that "sometime before the execution of the deed, but after J. W. Russ had

---

---

Gainer et al. v. Russ—Opinion of Court.

---

---

sued the boys, (Wm. G. E. Gainer and James Y. Gainer,) R. J. Alderman asked me if the lands were subject to the debts of Wm. G. E. Gainer and James Y. Gainer. I inquired of him who the lands belonged to. He said to the estate of James W. Gainer. I told him that it was not subject to their debts. Subsequently he, Alderman, brought me a deed unsigned and blank, as he said, from D. L. McKinnon. I remarked to him there was no consideration stated; he Alderman, told me to fill it in, and as well as I can recollect the consideration was put in at \$1 per acre. Alderman, Bridges and myself then went to the house now occupied by S. Brash and witnessed the signatures of the parties." This witness also testified: "There was nothing said as to the consideration of the deed. When the deed was executed, R. J. Alderman took it and handed it to his wife, who said she knew nothing about it."

The Chancellor decreed that the deed was fraudulent, null and void as against the claim of complainant. That said deed be and is hereby set aside, annulled and declared of no effect, and that a master sell the interest of Lucinda, William G. E. and James Y. Gainer in said lands and execute a deed to the purchaser, and that the money arising from the sale be applied to pay the debt due the complainant, and that the defendants pay the costs.

The defendants appeal from this decree. They allege error in overruling the demurrer to the bill and sustaining the demurrer to their plea, and in granting the decree setting aside the deed upon the testimony of only one witness.

The bill shows a plain case for the exercise of the equity powers of the court. These debtors, before suit, are pressed to pay their debt, and before judgment can be recovered against them they convey to the daughter of one, who is the sister of the other two, their interest in land worth \$1,500, for the avowed purpose of saving to themselves the

---

---

Galner et al. v. Russ—Opinion of Court.

---

---

personal estate of their husband and father free from the payment of his debts, amounting only to about two hundred dollars, and the necessary effect of their conveyance to Mrs. Alderman was to place the land beyond the reach of an execution to satisfy their debt of over eight hundred dollars due to complainant, while they have no property subject to execution.

There was ample personal property to pay the debts of the intestate, and this should be so applied before resorting to the real estate. Instead of this they endeavor to make the real estate, worth \$1,500, pay the debts and to save the personal (which they say is of more value than the land) to themselves, and keep the land from their own creditors. The result is a fraud upon the creditor.

A proper case for equitable interference is, therefore, clearly made by the bill and the demurrer was properly overruled. The plea shows nothing except that plaintiff endeavored to collect his claim by law and failed. It was overruled, of course, as it should have been.

The defendants insist that they having denied the fraud by the oaths of four of them, while there is the testimony of only one witness against them, their answer is not disproved. But they have denied only that they intended to defraud, while they admit all the facts charged in the bill and allege other facts tending to show the fraudulent character of their acts as charged against them. The testimony of the witness shows that Mrs. Alderman knew nothing of the objects of the transaction, and that no definite consideration for the conveyance had been agreed upon. If the consideration was as stated by them, to-wit: the payment of the father's debts of about \$200, (which debts should be paid out of his personal estate,) it was so grossly inadequate to the value of the interest conveyed that the presumption of fraud naturally arises, the grantors being indebted and

---

---

Gainer et al. v. Russ—Opinion of Court.

---

---

without other means of payment. This grantee is not a *bona fide* purchaser for she paid nothing at the time, and in fact “knew nothing about” the matter. She was a mere listless instrument used by the other defendants for their own purposes. Nor is it even alleged in the answer that she or any one for her has since the conveyance paid any of the debts which it is alleged she agreed to pay, and there is no proof of any such payment.

The denials in an answer in order to make it evidence and to require it to be overcome by the testimony of two witnesses or its equivalent, must be denials of the facts stated in the bill and not merely denials of conclusions or arguments flowing from facts? *Copeland vs. Crane*, 9 Pick., 73; 1 Dan. Ch., 844.

The 4th ground of error is, that the decree does not require the repayment to Lucretia A. Alderman of the amounts paid out by her on the purchase.

If she has advanced anything on account of the debts of her father she may be entitled to reimbursement by presenting her claims to the administratrix. Her position here is not such as entitles her to reimbursement out of the land under a decree in this case. In fact, as above stated, it is not alleged in the answer, nor is it proved that she has paid anything.

The remaining errors assigned are, that the decree requires the property of the estate of James W. Gainer to be appropriated to the individual debts of the heirs while there are outstanding debts against the estate remaining unpaid, and that the decree will prevent the faithful discharge of her duties by the administratrix by taking the property from her.

The answer to this is, that such is not the effect of the decree. It does not interrupt the due administration of the estate. The sale under the decree will be of the interest

---

---

Howard v. Moore et al.—Argument of Counsel.

---

---

of the judgment debtors, whatever it may be, subject to the claims of creditors of the estate. The status of the administratrix as such is not disturbed by the decree.

The decree is affirmed.

---

JOHN T. HOWARD, APPELLANT, VS. DAVID MOORE ET AL.,  
APPELLEES.

No lien enures under Chapter 3132, Laws, in favor of a laborer for a sub-contractor against a railroad company where the only privity of contract existing is between the company and the first contractor.

Appeal from the Circuit Court for Jackson county .

The facts of the case are stated in the opinion.

*John A. Henderson* and *D. L. McKinnon* for Appellant.

*Benjamin S. Liddon* for Appellees.

The appellees, who were complainants in the court below, brought suit to enforce laborers' liens upon the railroad of the Pensacola and Atlantic Railroad Company. John T. Howard, contractor, and the Pensacola and Atlantic Railroad Company were made parties defendant to this suit. This action was brought under sections 1, 2 and 3 of Chapter 3132 of Laws of Florida, Acts 1879, McClellan's Digest, page 730, Sections 41 and 42.

As to the first ground of demurrer, the first ground of error in the petition of appeal, I submit the following observations and authorities:

Howard is made a party to this suit for the reason that

---

---

Howard v. Moore et al.—Argument of Counsel.

---

---

he was the contractor for the building of the railroad upon which the appellees claim a lien for labor.

At the time of filing of the bill the road was unfinished or was then being built. Howard was made a party defendant in accordance with the general rule of equity practice, that all persons interested in the object of the suit should be made parties either complainant or defendant. Story's Eq., Plead., §728.

As to general want of equity in bill, the statute upon which this suit was brought is broad and comprehensive.

Statutes must be construed according to their plain import and meaning, and so as to carry into effect the evident intention of the Legislature. At the time (1879) of the passage of the act under which this suit was brought the Court below, a statute was in force. See McC. Dig. pages 721 and 722, or Chapter 3042, Laws of Florida, page 101, laws of 1877, which gave the mechanic or laborer lien upon the building, mill, &c., upon which his labor should be performed. This act hampered the lien with several restrictions by requiring that the contract should be made with the owner, and in the case of a journeyman or laborer, limiting the amount for which the owner was responsible to the amount due the contractor. The statute of 1877 did not mention railroads. The object of the Legislature of 1879 was to extend this lien to railroads, to free the lien from all restrictions and to give to those whose labor builds a railroad a guarantee for the payment of the same, and protection from fraud.

Public policy, justice and humanity alike require a liberal construction of such a law. The laborers of the country are generally ignorant people.

If it were not for this beneficent statute, a worthless and insolvent contractor or sub-contractor (if there be such thing) could employ a large force of laborers, build a road



---

---

Howard v. Moore et al.—Argument of Counsel.

---

---

collect his money from the railroad company and then refuse to pay the laborers or abscond, leaving them remediless, just as Colson did in this case.

It was to prevent such fraud and injustice that the statute was enacted, and the court should give the statute a liberal construction to aid in the accomplishment of its humane purpose. Schmidt vs. Smith, 61 Ala., 252; Geiger vs. Hurry, 63 Ala., 638; Welsh vs. Porter, 63 Ala., 225; Barnard vs. McKenzie, 4 Cal., 251; Westland vs. Goodman, 46 Conn., 83; Buck vs. Bryan, 2 How., (Miss.) 888; Buchannan vs. Smith, 43 Miss., 90; Barnes vs. Thompson, 2 Swann, (Tenn.) 313; Brown vs. Story's Administrators, 4 Metcalf, (Ky.); Oster vs. Rabman, 46 Missouri, 595; Putnam vs. Ross, 46 Missouri, 337; Skyrne vs. Occidental Mill Co., 8 Helm., (Nevada,) 219; Phillips Mechanic's Liens, pages 22 and 27, *et seq.*; Kneeland Mechanic's Liens, page 359, *et seq.*

It may be contended on behalf of appellant that there is no privity of contract between the appellees (complainants below) and appellant, Howard, (defendant below) and that therefore we show no right to recover as against him. I am aware that there are a number of old decisions, notably among them some from the Supreme Court of Mississippi; Shotwell and Mayrant vs. Kilgore, 4 Cushman, 125; Holmes vs. Shands, 4 Cushman, 639, and same case in 5 Cushman 40, to the effect that a mechanic's or laborer's lien does not attach to a building, unless the contract was made with the owner, and that it is limited to the amount due from the owner to the contractor. A careful reading of all such cases will show that such decisions were rendered upon statutes similar to our acts of 1868 and 1877, and not based upon law so broad and liberal to the workman as that upon which this suit is brought.

The statute upon which this action was brought has

---

---

Howard v. Moore et al.—Argument of Counsel.

---

---

never been passed upon by this court. The case of Trustees of Wylly Academy vs. Sanford, 17 Fla., 162, was based upon the statutes of 1868 and 1877.

When the statute is broad in its terms the courts will enforce the lien of the workingman, whether the contract be made with the owner or not; and whether the owner is indebted to the contractor or not; and a lien has been sustained where the owner had paid the contractor in full. Atwood vs. Williams, 5 Heath, 40 Maine, 409; Philips on Mechanic's Liens, page 84, *et seq.*

The subject of mechanic's liens is a new one. In the different states are statutes varying in their nature both as to the lien itself and the remedy for enforcing it. We can not tell what degree of authority to attribute to a decision until we know the statute upon which the decision is based. I have access to only a brief summary of the statutes of the different States upon this subject, but from them I learn that some States have laws like ours of 1879. The courts will enforce the lien even though it have the effect of charging the property of one person with a debt contracted by another, without his knowledge or consent. They hold in such cases that they will construe the statute strictly and not extend it beyond its manifest provisions, but they do not set the law aside nor nullify its provisions by construction. Mushlett vs. Silverman, 50 N. Y., 360; Hubbell vs. Schrezen, 15 Abbott, N. S., 300; Wager vs. Briscoe, 38 Michigan, 587; Brady vs. Anderson, 24 Illinois, 112; Philips vs. Stone, 25 Illinois, 80.

2. The second ground of appeal is that the bill did not state upon what portion of said railroad the alleged work was performed. The bill alleges that complainants therein rendered labor upon the said railroad in Jackson county, Florida. I do not know how much more definite and certain it could be.

---

---

Howard v. Moore et al.—Opinion of Court.

---

---

3. As to the third ground of petition of appeal, that James A. Colson is not made a party. The bill states that the bulk of the claims are already in judgment as against Colson, that he has absconded, that he is utterly insolvent, &c., &c.

In view of these statements, I do not see why Colson should be made a party to this suit. Making him a party would aggravate the costs to no purpose.

4. As to the 4th ground, that a court of equity has no jurisdiction, I cite McClellan's Digest, page 730, Sec. 42.

A court of equity would have jurisdiction to enforce this lien on general equitable principles, unless a clear and sufficient statutory remedy was given.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

David Moore and a number of others who are named as plaintiffs filed their bill against Howard and the Pensacola and Atlantic Railroad Company, in which they allege that the said company is engaged in building a railroad through Jackson county, Florida; that they were employed as laborers in the latter part of the year 1882 by one James A. Colson, in the building and construction of the railroad then being built by the Pensacola and Atlantic Railroad Company through said county, and that said Colson was a subcontractor under the defendant, John T. Howard. They set out the amounts due them respectively by said Colson and aver that they have obtained judgments against said Colson. They allege also that he is utterly insolvent; that he had absconded and could not be found in the county; that they had demanded payment of their claims of the said Howard, and had given notice of the nature of their claims to the said company. Plaintiffs pray that it

---

---

Howard v. Moore et al.—Opinion of Court.

---

---

may be decreed that they have a lien upon the said railroad and a sale of part of the road in Jackson county.

In this bill Howard interposed a demurrer, which being overruled he enters an appeal. Unquestionably no decree affecting this property can be made here without having the company a party to the proceedings, and it does not appear from the record that the company has been served with subpoena or has appeared.

In view of the conclusion we reach, however, we deem it necessary here to examine but one question, as the solution of that finally disposes of the case as it now stands. It is insisted that there is no equity in the bill. In other words, that the complainants have no lien against the road. It is not contended that these persons have any lien unless it is authorized by the provisions of Chapter 3132, Laws. The Legislature there enacted:

“SECTION 1. That hereafter every person who shall perform labor upon, in or for the benefit of any railroad, mill or manufactory in this State, whether in the construction, working or repairing thereof, to whom there shall be anything due for such services shall have a lien of prior dignity to all others upon such railroad, mill or manufactory, whether operated or owned by an incorporated company or not.

“SECTION 2. That such lien may be enforced by bill in equity, and all or any number of persons holding such lien may be joined as parties complainant.

“SECTION 3. That in case suit be brought for such debt at law the Judge having jurisdiction may order execution to be levied upon the property of such railroad, mill or manufactory, and the sheriff or other officer shall proceed to sell the same notwithstanding any claim of exemption interposed.”

The claim here is not that of a contractor or laborer for

---

---

Howard v. Moore et al.—Opinion of Court.

---

---

the company, nor is it a demand for work performed for the contractor, Howard. The services are rendered for a sub-contractor between whom and the company it is not even alleged there is any privity of contract, nor is it alleged that there is any sum due the contractor by the company. The question, therefore, is, has such a person a lien under the statute. In the argument of this case it was insisted upon one side that statutes of this character should be liberally construed, they being in aid of the laborer. While upon the other side it was contended that such statutes created secret liens, were contrary to common right, conferred special privileges and rights upon one class of a community not enjoyed by others, and that they should therefore receive a strict construction. A slight examination of the books will show that such contradictory rules of construction have been announced by the courts in treating the subject generally. Our examination, however, leads us irresistibly to the conclusion that the cases which approach nearer to the precise question here involved do not sanction the view that the road here is subject to the claim of laborers for the sub-contractor. In the case of *Wood and Wood vs. Donaldson*, 17 Wend., 551, a similar question arose in the Supreme Court of New York. The first section of an act of the Legislature of that State provided "that every mechanic, workman or other person doing any work toward the erection of any building in the City of New York erected under a contract in writing between the owner and builder, or other persons, whether such work be performed as journeyman, laborer, cartman, sub-contractor or otherwise, and whose demand has not been paid, may deliver to the owner an attested account of the amount and value of the work thus performed remaining unpaid, and thereupon such owner shall retain out of his subsequent payment to

---

---

Howard v. Moore et al.—Opinion of Court.

---

---

the contractor the amount of such work for the benefit of the person performing the same.”

It was held that such a statute gave no lien to the creditor of a sub-contractor. See also same case, 22 Wend., 395, where Chancellor Walworth discusses the subject generally under the first section of the New York statute.

In the case of Hartman vs. Rand, 27 Penn. State, 515, Lowrie, J., speaking of the relation of a material man to the owner of the property under a general lien law, in the head note, says: “No one has power to bind the building for work done or material furnished, except the owner or contractor under him.” In the body of the opinion he uses this language: “The claims of workmen and material men do not become liens on a house from the mere fact that the work was done or the materials found for its erection, for they must be founded on a contract, express or implied, direct or indirect, with the owner of the estate sought to be charged.” Like principles are asserted in Kirby vs. McGarry, 16 Wis., 68, and in Greenough vs. Nickols, 30 Vermont, 768.

Our statute provides for payment for sums due for services. This language implies the existence of a contract. So also the provisions of the third section contemplate contract relations, for what is there provided for is the satisfaction of a judgment at law against the railroad company, mill or manufactory, and certainly it will not be pretended that the laborers under a sub-contractor stand in any such contract relation as enables them to obtain a judgment at law against such company, mill or manufactory.

A person who does labor under contract with the company has a lien under the statute. It may be also that one who labors or does work for a contractor has a lien, as it seems that there is such privity between such laborer and

---

---

Gale et ux. v. Harby et als.—Syllabus.

---

---

the company as justifies the existence of a lien. But this question is not here involved.

As to laborers under a sub-contractor, however, there is no privity between them and the company, and a fair examination of all the cases on the subject leads to the conclusion that no such lien exists unless the words of the statute clearly contemplate it. Phillips on Mechanic's Liens, §§45 to 51, inclusive, and cases cited.

The judgment overruling the demurrer is reversed, and the case will be remanded with directions to enter final judgment for defendants upon the demurrer, unless the plaintiffs desire to make a case by amendment, in which event the usual practice will be followed.

---

FRANK P. GALE ET UX., APPELLANTS, VS. CHARLES S.  
HARBY ET ALS., APPELLEES.

1. Trusts arising under a will are express trusts to be controlled and interpreted under the terms of the will.
2. Where, by a will, a portion of the property is devised or bequeathed to certain of the grandchildren of the testator, with directions to his executors to hold it in trust for and to use and control it for the interest of the grand children until they should marry or become of lawful age, when it was to be divided among them, the mother of such grandchildren acquires no interest in the property.
3. Parol testimony is admissible to show that the grantees in a deed of conveyance of land absolute on its face, purchased as trustees, with a knowledge of the trust, that the cash paid at the time of the purchase was money realized from the sale of the trust property, and that subsequent payments of the balance of purchase money due was money realized from the use of the property purchased with the trust fund. A purchase with trust funds is virtually

---

---

Gale et ux. v. Harby et als.—Syllabus.

---

---

a purchase paid for by the *cestui que trust*. Such a purchase is a trust by operation of law not within the statute of frauds, and the fund may be followed so long as its general character can be identified. Where the grantees admitted the trust, and that the purchase was made with trust funds, as well as that they held as trustees, the trust arises by operation of law based upon presumed intention of the parties, and is a resulting trust.

4. Where a party knows that he is dealing with trust funds he is held to knowledge of the character of the trust whether he advises himself of its precise nature or not. A knowledge of the fact that another person has equitable title to the fund is sufficient to charge him with knowledge of the character of the trust.
5. Admission by parties sought to be charged as trustees that they were trustees sworn to by disinterested witnesses, such admissions being accompanied by corroborating circumstances, are evidence of the highest character. This in a suit to establish the trust against one who claims through the party so admitting the trust. So also is the fact that all the parties dealing with the estate admitted the existence of the trust for years admissible as evidence, as well as the fact that at the time of the purchase the financial condition of the party was such as "makes it impossible for him to have been the purchaser."
6. Where the facts set forth in the bill disclose the nature of an express trust under a will that the character of the trust is misconceived and the effect of the devise or bequest not correctly stated is immaterial. The court will make its own conclusion from the facts stated and proved.
7. Where the facts are set forth in the original bill an amendment simply stating a conclusion of law deemed to follow from those facts, such as a general charge that an act was the result of fraud, accident or mistake, no specific act of fraud, accident or mistake being alleged, may and should be treated as surplusage. While this is bad pleading, its effect cannot be to destroy equities otherwise alleged and shown upon the hearing to exist.

Appeal from the Circuit Court for Leon county the case having been transferred from Madison county.

The facts of the case are stated in the opinion.



---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

*S. Pasco* and *C. W. Stevens* for Appellants.

*A. Paterson, F. W. Pope* and *J. B. Marshall* for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The subject matter of this controversy is a tract of land in Madison county, Florida. All of the parties, plaintiffs and defendants, except J. Leroy Gale and her husband, Frank P. Gale, and Sarah E. Ward and her husband, John E. Ward, maintain that the property is the subject of a trust under, and is controlled by the will of Andrew Hampton, who died in the State of Georgia, in the year 1840, and that under this will and a deed from Rachel Griffin, the daughter of Andrew Hampton, who had, as they allege, a life estate under the will, the present existing equitable interest in the land is divisible into six parts, one of which goes to each of the children of Hardy Griffin and Rachel Griffin. That is to say, one part each to Ella L. Harby and William D. Griffin, children of Hardy and Rachel Griffin, one part to J. Leroy Gale, who is the sole heir of J. L. Griffin, a son of Hardy and Rachel, one part to Joseph L. Lelia and Eugene Griffin, heirs at law of A. A. Griffin, a son of Hardy and Rachel, one part to Lucia Jones and Hattie Vandiver, children of Mary E. Whitlock, a daughter of Hardy and Rachel Griffin, one part to S. Janie Hines, a child of S. Janie McGehee, who was a daughter of Hardy and Rachel Griffin. Plaintiffs seek a partition of the land according to this view, and such is the prayer of the bill. The defendant, Leroy P. Gale, on the other hand insists that the land was the property of A. A. Griffin and Joseph L. Griffin, children of Hardy and Rachel Griffin, that they held it as tenants in common, and that she as the sole heir of Joseph L. Griffin is entitled to one-half

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

of the land. The general claim of plaintiffs is that certain trust property, in which they had a sixth interest as above set forth, under the will of their grandfather, Andrew Hampton and the deed of their mother Rachel, was invested in this land, and that the land was paid for by the proceeds of the trust property and its use. The land was conveyed by Thomas J. Linton to A. A. and Joseph L. Griffin, and the deed is absolute upon its face, A. A. and Joseph L. Griffin giving a mortgage to pay the balance of the purchase money. The defendant insists that no part of the trust fund entered into the purchase and that it was made upon the credit of her father and her uncle, A. A. Griffin, who afterwards satisfied the mortgage by the results of a joint use and cultivation of the land. The plaintiffs insist that a large cash payment consisting of the trust fund, was made by A. A. and J. L. Griffin, and that the payment of the mortgage was made from funds realized from the after cultivation of the land by slaves belonging to the trust fund, and that both Joseph L. and A. A. Griffin, the grantees, and the grantor Linton, acknowledged at the time of the execution of the deed by Linton that A. A. and Joseph L. Griffin acted as trustees in the purchase, and that neither they nor their representatives up to the time of the institution of this suit ever denied that they were trustees.

The Circuit Court sustained the view of the plaintiffs, and made a decree accordingly, from which only two of the defendants, J. Leroy Gale and her husband, appealed, which appeal is entered after a severance as to the interests of F. P. Gale and wife.

The first ground of appeal is that the merits of the cause are with the appellants.

The will of Andrew Hampton and the relationship of the parties to him is not denied. The interest which went

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

to Rachel Griffin, his daughter, or to her children must be fixed by it. As to this matter the testator directed, "that all my estate, both real and personal, be divided into nine equal lots or shares, and my executors shall set apart by lottery one of said lots or shares to each family of my grandchildren." The testator directed that the fathers of his grandchildren should have the "emoluments and profits" of the property, given to their children during their lives (the fathers) and that "should any of my grandchildren marry or become of lawful age then and in that case their father or fathers may give to them a portion or share of their property if they think proper to do so, otherwise it will remain together until their father's death, then to be equally divided between such grandchildren, share and share alike." The testator, as to the property given to the children of Rachel Griffin, which is the origin of the trust here, directed "that the following exceptions bear in relation to every part of my estate, that is to say, the portion or part of my estate that I bequeath to the children of my beloved daughters Rachel and Mary, to be held in trust by my executors, and the said executors to use and control in any manner that they think most conducive to the interest of the children of the said Rachel and Mary, free from the control of their present husbands, or any future husband they may have, until it would have been distributed had this exception not have been made." The executors named in the will were the four sons of Andrew Hampton, of whom Benjamin W., John M. and Andrew Y., qualified and undertook the trust. The original trust thus arising under a will is an express or direct trust, and it is controlled, and to be interpreted by the terms of the will. It is apparent that under this will Mrs. Rachel Griffin had no interest in the property devised or bequeathed to her six children. The legal title was in the executors qualifying

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

and the equitable estate was in the children, each child to be entitled to his or her share upon his or her marrying or becoming twenty-one. All of the children of Rachel Griffin are twenty-one years of age, and all of them now living, unless it be William D. Griffin, have been or are married.

The deed of Linton to A. A. and J. L. Griffin being absolute on its face, the next question here involved is whether it can be shown by parol testimony that they purchased as trustees with a knowledge of the trust; that the cash purchase money was money realized from sales of property coming to the children under the will, and that the subsequent payments upon the land were made from moneys realized through the cultivation of the land by slaves belonging to the trust property and derived under the will. Perry on Trusts, in treating of this subject, asks the question, "whether trust money can be followed into land by parol evidence," and he answers the question by stating that "it is clearly established it may on the ground that a purchase with trust money is virtually a purchase paid for by the *cestui que trust*, and such a purchase is a trust by operation of law and not within the statute of frauds, and the fund may be followed so long as its general character can be identified." Perry on Trusts, §§138, 127.

Sir William Grant, in *Lench vs. Lench*, 10 Ves., 517, speaking of this matter, says: "Then as to the other ground that the purchase was made with the trust money, all depends upon the proof the fact; for whatever doubts may have been formerly entertained upon this subject, it is now settled that money may in this manner be followed into the land in which it is invested; and a claim of this sort may be supported by parol evidence."

Says Lewis, Justice, in *Thompson's Appeal*, 22d Penn. State, 17: "Whenever a trust fund has been wrongfully

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the *cestui que trust*. No change of its state and form can divest it of such trust. So long as it can be identified, either as the *original* property of the *cestui que trust* or as the *product* of it, equity will follow it, and the right of reclamation attaches to it until detached by the superior equity of a *bona fide* purchaser for a valuable consideration without notice. The substitute for the original thing follows the nature of the thing itself so long as it can be ascertained to be such." See also Story's Eq., §1257, cases cited to note 6; §128, Perry on Trusts.

This is a resulting trust, so far as it is created by operation of law, and based upon presumed intention of the parties, and acts of A. A. and J. L. Griffin intended to be acts as trustees unaccompanied by fraud. If the purchase money belonged to the trust fund, and A. A. and J. L. Griffin knew that fact, and by virtue of their influence with their mother, Rachel Griffin, as her sons, and contrary to the understanding with her they took the deed in their own name, intending a personal gain, it is a trust as against the children, accompanied by fraud, and that is a constructive trust. From such circumstances and relations courts of equity raise a trust by construction. "This trust they will fasten upon the conscience of the offending party and will convert him into a trustee of the legal title and order him to hold it or execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society."

It makes no difference in this case that they did not understand that the trust was for the children, and there was no life estate in the mother. If they knew it was trust money they were dealing with they are held to notice of its character whether they took the trouble to advise them-

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

selves of its precise nature or not. It is enough for them to know that some other person has an equitable title to the property, and that they are dealing with trust property. A knowledge of such facts as should lead them by inquiry to full knowledge of the actual facts is all that is necessary.

This leads us to an examination of the evidence. The deeds in evidence show the following transactions: That on the 10th of October, 1854, Thomas J. Linton agreed to sell Hardy Griffin a large body of land in Madison county, including nearly all of the land mentioned in the bill, for the sum of \$25,000, \$2,800 on the first of January of the years 1856, 1857, 1858, 1859 and 1860, \$3,000 on the first of January, 1861, and \$8,000 on the first of January, 1862, the note to draw interest at six per cent. per annum from January 1, 1855, and that Griffin was to have possession on January 1, 1855, and was to give a mortgage on the land to secure the payment of the seven notes; that on February 8, 1855, Linton conveyed this land to Hardy Griffin, and that Hardy Griffin gave a mortgage to him on the land to secure the payment of the notes which were given as agreed upon, Mrs. Griffin releasing her dower interest therein; that on the 14th of March, 1856, Hardy Griffin reconveyed the land to Linton, stating the consideration to be a payment of \$25,000, Mrs. Rachel Griffin, the witness, releasing her dower interest therein; that on the next day, the 15th of March, 1856, Linton conveyed 1,480 acres of land included in the former transactions, and 120 acres adjacent thereto, making in all 1,600 acres to J. L. and Archibald A. Griffin as tenants in common, the consideration being stated to be a payment of \$12,000; that on the same day (March 15, 1856) Archibald A. and Joseph L. Griffin mortgage the same land to T. J. Linton, reciting an indebtedness to him shown by six promissory notes, the

---

*Gale et ux. v. Harby et als.—Opinion of Court.*

---

first due January 1, 1857, for \$2,507, the others for different sums becoming due January 1, 1858, '59, '60, '61 and '62 for the sums which, with the amount of the first note, aggregate the sum of \$17,914.70, the notes given for the several sums not bearing interest until after their maturity, the wife of J. L. Griffin, Sarah E., relinquishing her dower interest, and that this mortgage was satisfied on or before the 28th day of May, 1863, and the evidence discloses that J. L. Griffin died before the first note became due in December, 1856, and there is no evidence in this record which shows that his administrator, or any one representing him, ever paid a cent of money for him upon the mortgage debt. He is the father of J. Leroy Gale, and she is the defendant now claiming one-half of the land. In addition to this, if the evidence in this case shows any one fact with distinctness and certainty, it is the fact that J. L. Griffin, the ancestor of J. Leroy Gale, at this time did not own but a very small property. J. L. Griffin died the second year after he came to Florida. He had when he came one buggy, one trunk and two horses, and A. A. Griffin had no property but two horses, and this property, both of J. L. and A. A. Griffin, their mother testifies her husband bought for them with her money. For the year 1855 his taxes are assessed at \$4.07, and his property named as a carriage and three slaves, and in 1857, after his death, his administrator pays taxes on slaves valued at \$1,200 and notes valued at \$400. This, however, is not all of the evidence upon the subject of the financial ability of these parties. As to this matter and all the other facts a substantial statement of the essential portions of the evidence will disclose the truth.

This leads us to the consideration of the testimony.

Mrs. Rachel Griffin testifies that her father, Andrew Hampton, gave her and her children a place in Lawrence county, Georgia; that she sold that place and with the

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

proceeds bought a place in what was then Baker county and now Dougherty county, Georgia; that she sold this place, moved to Florida and bought the plantation described in the bill, making the first payment from the proceeds of the sale of the land in Georgia; that the sale in Georgia was for part cash and part credit, and the balance was applied to the payment for the Florida place; that Wade Hampton was her first trustee, and after his death John M. and Andrew Y. Hampton became her trustees, her husband, Hardy Griffin, acting in all these transactions with the permission of her trustees; that the titles were made to A. A. and J. L. Griffin, because she chose them as her trustees, and that they consented thus to act. She says that "when we came to Florida we bought the plantation where M. W. Linton now lives" from Mr. T. J. Linton; that he, Mr. T. J. L., became dissatisfied as her property was trust property; that the first deed was made to her husband, Hardy Griffin; that her husband then sold the place back to Mr. Linton, and bought then the place described in the bill; that the deed to this place was made to her sons A. A. and J. L. Griffin, who agreed to act as her trustees, Mr. Linton agreeing to take a mortgage from them for the balance of the purchase money; that he would not make the transaction with her husband, because he was embarrassed; that her sons then gave a mortgage on the place to Mr. Linton for the balance of the purchase money, and did it by her direction; that the mortgage was paid by A. A. Griffin, her trustee, J. L. Griffin, having died the second year after she moved to Florida, and had nothing to do with the payment; that A. A. Griffin paid the mortgage with the proceeds from the negroes her father gave her, working on the place. She produced three of the mortgage notes, which she says she has had in her possession ever since



---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

they were paid; that all of the notes were paid and in her possession. One of these notes is endorsed, "paid April 1st, 1861, by trust funds, A. A. Griffin, Trustee"; that J. L. Griffin had no property when he came to Florida, but one buggy, a trunk and two horses; that A. A. Griffin had two horses, which her husband bought for them with money from her estate, and that neither of her sons ever claimed any part of the land; that all the property was given in by A. A. Griffin, her trustee; that if her husband ever paid any taxes upon it he paid them as agent. She produces a number of tax receipts; among them we find a receipt for the year 1852, to Hardy Griffin, as agent for his wife and children, for \$59.52, and a receipt to J. L. Griffin for forty cents for his taxes for the year 1852. A. A. Griffin pays a like forty cents for his taxes. For the year 1855 J. L. Griffin \$5.70, and A. A. Griffin \$1.84, while A. A. Griffin, as agent, pays \$70.27 railroad tax for the year 1855. There are other receipts, some by A. A. Griffin, as trustee, and there are copies of assessments taken from the office of the Comptroller of Public Accounts of the State, which show that A. A. and J. L. Griffin and their father had very little property, while Mrs. Griffin owned or proposed to own the estate in question here. She says that her husband, when they were married, had a good deal of property; that he lost it by standing security for his brother, who bought a steamboat, which was burned on her first trip; that he had to pay \$30,000 debt and interest from year to year; that her husband was sued, and all or a part of his property sold; that a debt still remained unpaid; that they then moved to Alabama, and the debt followed him there and broke him up again; that her father then wrote to her that if she would come back to Georgia he would buy a plantation for her and her children; that they then went back to Georgia, to the plantation he gave her, called the

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

“Colwell” place; that her father lived about three weeks after they moved back to Georgia; that she got the portion of property as devised to her by the will, and it included the “Colwell” place, which is the place referred to in her testimony, as having been sold when she moved to Baker county, Georgia, and from the proceeds of which she derived her property in Madison county, Florida; that the business of the plantation had always been carried on by her direction, and that neither her husband nor her trustees ever transacted any business, as to the land, without her consent or direction. A number of account sales of cotton are produced as evidence by complainant’s counsel. They show sales on account of Mrs. Rachel Griffin, and of A. A. Griffin, trustee, in 1867, 1869 and 1870. She says further, that she has given over her interests to her six children, and has made quit claim deeds for their parts to such of them as desired it, and they fixed it up among themselves.

These deeds are from Rachel Griffin to Ella L. Harby, S. Janie Hines, W. D. Griffin, trustee of minor children of A. A. Griffin, and W. D. Griffin in his own right, and extend in date from April 8, 1875, to January 22, 1877.

A deed from Sarah E. Ward, late widow of J. L. Griffin, and mother of defendant, J. Leroy Gale, who asserts the claim to one half of the land to Mrs. Rachel Griffin, is produced. It is dated the 26th of September, A. D. 1874. It recites as a consideration the fact that her former husband had never paid for the lands described in it, and “that the titles to said lands were made in the name of A. A. and J. L. Griffin, with the distinct and full understanding that they only held these titles to this land as the trustees for Mrs. Rachel Griffin, of the county of Madison, State of Florida.” This recital is made substantially a second time in the deed. The deed purporting to convey all of the

---

---

Gale et ux. v. Harby et ala.—Opinion of Court.

---

---

dower interest of the grantor in the lands, and the lands were a part of those embraced in the deed to A. A. and J. L. Griffin. The deed, Mrs. Griffin says, was brought to her by her son, A. A. Griffin, not long before he died. A letter of the widow of J. L. Griffin to A. A. Griffin is also placed in evidence. This letter shows a good deal of unfriendly feeling towards "Ella and Sis Mary," meaning thereby two of the daughters of Hardy and Rachel Griffin, and recites a cause, which if it existed, would naturally occasion such feeling. It adds nothing to the recitals in the deed, and no further reference to it is necessary. There is also in evidence a receipt given by Sarah E., as guardian of her daughter, J. Leroy Griffin, to A. A. Griffin, administrator of the estate of J. L. Griffin, for three slaves. The receipt recites that it is all the property of the estate of J. L. Griffin left after discharging the debts of the estate. This witness states further, that J. L. Griffin died insolvent; that A. A. Griffin administered on his estate; that his debts were paid from her estate; that his father-in-law, from whom he had received two negroes and two children, came from Georgia and got them. She says that J. L. Griffin lived with her up to his death. Upon cross-examination this witness states that she got a thousand or fifteen hundred dollars for the place she sold in Lawrence county, and eight or ten thousand dollars for the place in Baker county; that she does not recollect the exact date she came down to Florida, but it was about twenty-two years ago; that the last payment on the place in Georgia was made before the war; that her trustees served generally, and when they did not her husband did; that the mortgage of A. A. Griffin and J. L. Griffin, was paid up during the war; that J. L. Griffin's wife, when married, received no property; that the estate of A. A. Griffin never was administered upon; that he had no estate but his cattle; that

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

she gave \$4,000 or \$5,000 for the land in Baker county. This witness upon subsequent examination says she requested her sons to take a deed to this land as trustees; that she thought they had done so until just before the commencement of this suit; that it was at Mr. Linton's request she appointed them trustees; that they all led her to believe that it was a trust deed and her sons so acted; that soon after said deed was given she sent J. L. Griffin, as her trustee, to Georgia to settle some business with her brother-in-law Mr. Spicer, and others.

Mrs. E. A. Spicer, witness for complainants, testifies as follows: I know all the parties to this suit. I knew Hardy Griffin. I think Hardy Griffin and Rachel Griffin came to Florida in 1854, but do not know exactly. I knew A. A. and J. Leroy Griffin ever since they were born; they were the children of Hardy and Rachel Griffin. When Hardy and Rachel Griffin came to Florida they had only trust property belonging to Rachel Griffin. They bought large bodies of land when they came to Florida from Thomas J. Linton. They could not pay for the land in full, but what they did pay was paid out of these trust funds brought from Georgia. The deeds were first to be made to Captain Hardy Griffin, but Thomas J. Linton found out that Captain Griffin owned nothing but trust property belonging to Rachel Griffin, and was in debt. Mr. Linton then told A. A. and J. Leroy Griffin if they would give him a mortgage for the balance due on the land he would make them a deed individually, but not as trustees. Although A. A. and J. Leroy Griffin wanted it made that way, I mean to them as trustees, because Thomas J. Linton said to me trustees were not allowed to mortgage property under the laws of Florida. T. J. Linton told them they could, after, arrange the matter with the other children, he only wanted to be secured, and desired the mortgage from A. A. and J. Leroy

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

Griffin individually for the reason above assigned, although he knew it to be trust property from inquiries made from Georgia and other sources. I purchased a portion of these lands known as the Easter Fields, now controlled by J. Leroy Gale, from A. A. Griffin, as trustee for Rachel Griffin, he saying that Rachel Griffin was willing to fix up the deed. I went to see Thomas J. Linton in reference to some other matter, and he then told me not to purchase the lands from A. A. Griffin, as he did not think he could make good title to it, as the property belonged to Rachel Griffin, and was trust property. I then told him that Rachel Griffin would sign the deed. Mr. Linton told me he would give me a four thousand dollar note, which he held against the Griffins on the land and had a mortgage to secure the same, and that he would release said mortgage and give me a good title, as A. A. Griffin could not, taking the said land in payment for said note, and then sell the same land to me, taking a mortgage from me to secure the payment thereof, giving me the same time he gave the Griffins. I concluded I would not take the place, even after putting some improvements upon it. *I have heard both A. A. and J. Leroy Griffin say, repeatedly, that they held these lands as trust property for their mother, Rachel Griffin.* They only claimed each a horse and buggy as their individual property. J. Leroy Griffin came to me in Georgia in 1856, after the purchase of these lands, for the purpose of winding up some trust affairs, and said to me: Aunty, I have come to settle up some trust business of ma's, as you know I am her (Rachel Griffin's) trustee. I came to see uncle Jack (that is my husband) to settle some trust business, but he is dead. He told me not to be uneasy, as he would settle these matters with me, as he was trustee. The trust estate was owing me at the time. I have often heard A. A. Griffin say this property was his mother's and regretted J. Leroy

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

Griffin, his brother, died before they could have this matter properly arranged, and he, A. A. Griffin, went to Georgia to see the widow of J. Leroy Griffin, and said he thought he had it all settled up. I know it was by the request of Rachel that A. A. and J. Leroy Griffin agreed and did act as her trustees.

On her cross-examination, she says: I am sister to Mrs. Rachel Griffin. I have been living in Florida since 1861. I moved from Albany, Dougherty county, Ga. Mrs. Rachel Griffin and I were near neighbors in Georgia, Dougherty county; our plantations joined. The plantation up there I know was my sister Rachel's because my husband, as trustee, purchased the place for her. The place up there was sold to Dr. Hunt and the proceeds applied to the purchase of this place. I mean these Linton lands mentioned in this suit. The lands I referred to in my direct examination are located near Greenville, in Madison county, Fla., and are the lands mentioned in this suit for partition. In reference to that part of my direct examination, where I said J. Leroy Griffin, who was my nephew, visited me in 1856, I do not know what the main object of his visit in that county was for, but I think he had been attending court at Newton, and came by to see my husband, to whom, I think, he was indebted as trustee for a certain amount due from Mrs. Rachel Griffin. *I lived with A. A. Griffin for twelve months, during which time I frequently heard him say he was trustee for the property mentioned in this suit.* He never claimed a foot of it, but always spoke of it as his ma's. I have no interest in this suit whatever. In my direct examination, where I spoke of purchasing the Easter Fields, I mean that I simply agreed to do so. No deeds or writings were ever drawn up. I moved on them intending to take the place, but concluded not to do so, under the advice of Mr. Linton. In my direct examination,

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

where I said Mr. Linton said he would make me a good title, I meant he would lend me the money, that is, the four thousand dollar note to pay for the land, and that the Griffins, upon its receipt from me, would make me a title to the said Easter Fields, the said Linton cancelling the mortgage he held upon the Easter Fields; then I was to make a mortgage on said lands to secure to the said Linton payment of the said four thousand dollar note. *I have been living here in Greenville, in Madison county, since 1861, most of the time with the Griffin family.* Rachel Griffin, my sister, has been living on this place in dispute all the time, claiming it as her own, and I never heard any one, before the commencement of this suit, deny or attempt to deny her title to the same. A. A. Griffin lived on a part of the plantation, that part that I thought once of purchasing, and exercised supervision over the whole as trustee, always receiving instructions and directions from Mrs. Rachel Griffin. I was intimately acquainted with A. A. and J. Leroy Griffin. *I knew their means and opportunities for making money, and don't think it possible for them to have made money sufficient out of their own means to have paid for these lands, indeed I can say positively that they had not money of their own to purchase said lands, but that they were purchased with trust money belonging to Rachel Griffin.*

Upon a subsequent examination this witness states that Mrs. Rachel Griffin's plantation in Georgia and hers joined; that she knew it was her sister Rachel's, because her husband, who was trustee for Mrs. Griffin, bought it. She says she lived with A. A. Griffin for twelve months, and frequently heard him say he was trustee for the property; that her sister, Rachel Griffin, has been living on the place all the time, claiming it as her own; that she never heard any one, before the commencement of this suit, attempt to deny her title to the same, and that she has personal knowl-

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

edge of the fact that neither A. A. nor J. L. Griffin had means or such opportunities for making money as this purchase required; that she did not witness any of the payments for the land; that J. L. Griffin in 1856 spoke to her about this purchase; told me he was trustee; spoke of these lands as his mother's; that this was in Georgia. The rest of this testimony is already in substance stated.

W. O. Hampton says he knows the parties, and that Mrs. Rachel is "the sister of my father," B. Wade Hampton, who was trustee for the property of Mrs. Rachel Griffin, received from her father's estate. At "my father's" death, his administrator acted as her trustee, then A. Y. Hampton, her brother, was her next trustee. This was all in the State of Georgia. The next trustees who were appointed, or acted as trustees, were A. A. and J. L. Griffin. Does not know that they were appointed by order of court. The first trustees were appointed by the will. He lived with Mrs. Rachel Griffin and family in Dougherty county, Georgia, before they moved to Florida. I remember their selling the place they lived on there, which place belonged as trust to Rachel Griffin. I remember their buying the premises of Thomas J. Linton, the deed being made to Hardy Griffin; that Linton was dissatisfied when he learned that Hardy Griffin was insolvent. He demanded a settlement, and they met and agreed to settle by turning over a part of the lands to Linton, and purchasing the lands that are now in dispute; that A. A. and J. L. Griffin have both told him that they were the trustees of this property in the place of A. Y. Hampton. They were here a year or more before I came to Florida. I lived in a mile of the place of Rachel Griffin, the first year I came here, and have visited the house frequently for the last twenty years, and have had dealings with Hardy, A. A. and J. L. Griffin; that in a transaction with Mr. Lin-



---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

ton he took in part payment \$3,000 of the notes given for the land; that he did not wish to take the note, but that Mr. Linton said that A. A. and J. L. Griffin were trustees for the whole property, the notes were good. These notes were paid, \$1,100 out of the estate, and the balance from proceeds of cotton of Mrs. R. Griffin; *that Mrs. Griffin has held* this property in her possession ever since it was purchased, until this division was made among her children. He says that he was intimately acquainted with A. A. and J. L. Griffin, and they had but very little property when they came to Florida; that at the time of the sale of the land, J. Y. Griffin had, through his wife, a few negroes, a man and a woman; that A. A. Griffin had a few cows, also two horses; that at the time of the purchase from Linton, she had some thirty-seven or eight negroes in all, and that she received these from her father's estate. Upon cross-examination, he says that A. A. and J. L. Griffin told him in September, 1855, at their father's house, that they were now the trustees of their mother's property and had got rid of a great trouble; that she was in the room when J. L. Griffin died. Upon a subsequent examination this witness says: "The payment made by Hardy Griffin, when he first bought the land from Linton, was used as a payment on the purchase of the same place, when the deed was made to A. A. and J. L. Griffin; that he does not recollect the amount; that the balance was in notes secured by a mortgage. He states that Hardy Griffin had failed to pay the second payment on the land, and Linton became dissatisfied, understanding that Griffin was a bankrupt; that Linton proposed to take the land back; that Linton and Griffin agreed to have an arbitration, and the arbitration met at Sidney Linton's, in Jefferson county; that the arbitrators were A. A. Griffin, J. L. Griffin, Dr. Turnbull, Sidney Linton and himself; that T. J. Linton and Hardy

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

Griffin were present; that the award was that Linton should turn over a large part of the lands that Hardy Griffin had bought from him, Linton agreeing to put the payment that Hardy Griffin had made upon the first purchase to the credit of the second purchase, which are the lands now in controversy, and that the papers were drawn up accordingly and the deed made to A. A. and J. L. Griffin; that the first payment was made from the proceeds of the sale of trust lands in Georgia. This witness says: "When Linton made the trade with Hardy Griffin, he did not make it with him as trustee, but as Hardy Griffin. He knew nothing about this trust estate at the time," and the deed was made to A. A. and J. L. Griffin "because Mr. Linton required it to make his money safe, they being then the legal trustees of their mother's property." He says: "I rode with A. A. Griffin the evening of the arbitration, and he told me he and his brother, J. Leroy were the legal trustees, and the reason why the deed was signed to them, not as trustees, was because Linton objected to take a mortgage from them as trustees. I then asked him, do you consider this land trust property? His answer was, I do. I asked him and J. L. Griffin if they considered the lands trust property, and their reply was, we do." He says they did not want Mr. Linton to make them a deed as trustee, because Mr. Linton proposed his own terms, and they accepted them; that is what he based his terms upon; that he would not make a trust deed because he would not take a mortgage from trustees; that is what he proposed in the arbitration and they accepted it; that he heard Mr. Linton, on the day of arbitration, say to A. A. and J. Leroy Griffin, that they need not tell their mother; that they could soon pay it and make it all right. As to the payment of the purchase money, he says Hardy Griffin paid on the balance of the purchase money, as long as he

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

lived, from the proceeds of the plantation which was worked by the slaves of Rachel Griffin. After his death A. A. Griffin settled the balance of the claim with cotton that his mother had on hand after the war. Upon cross-examination, he says that he did not see Hardy Griffin make the first payment to Linton; that he did not see any money paid over from trust property in Georgia to Hardy Griffin when they made the agreement that Hardy Griffin should sell the land there and buy lands here; that he was told by Judge A. Y. Hampton, the former trustee, that the trusteeship was transferred to A. A. Griffin and J. Leroy Griffin; that they had been appointed in his stead here. They, themselves, told me so. I have never seen any order appointing them as trustees.

Mrs. Laura A. Horn, a sister of Mrs. Rachel Griffin, testifies that she did not move to Florida until two years after her sister; that she was here on a visit when J. L. Griffin died; that she has known the parties to this suit all her life. She swears positively that when Hardy and Rachel Griffin moved to Florida there was no property in the hands of any of the family except trust property. She is equally related to all the children, and has no interest in the suit; that she never heard either J. L. or A. A. Griffin lay any claim to the property; but has heard A. A. Griffin say that he was trustee for this property, and in all business transactions he always consulted his mother. Upon cross-examination, this witness says she came to Florida about nineteen years ago, but that she don't remember dates exactly, and that the land was purchased by the proceeds of the trust fund, because they had no other property that she knew of.

Upon a subsequent cross-examination, the statements made upon the direct examination were substantially re-

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

peated, except that she says that she knows that until the death of Andrew Hampton, Hardy and Rachel Griffin were very much reduced in circumstances; that she knew nothing of her own knowledge as to the purchase of the Linton lands; that she heard A. A. Griffin and Hardy Griffin both say that A. A. Griffin was trustee, and that A. A. Griffin always spoke of the land having been paid for in trust property.

Dr. Jacob Cohen testifies that he has known A. A. and Rachel Griffin thirty years; knew them in Baker, now a part of Dougherty county, Georgia; that he lived in Lawrence county; was a practicing physician there, and boarded with Mrs. John M. Hampton, and that he has lived in Madison county since the spring of 1862; that he was intimate with A. A. Griffin, and sought to buy land from him, and that Griffin informed him that he owned no land, but held some as trust property for his mother, and would lease me some land, as trustee; that he leased the land for five years; that at the expiration of the lease the land and improvements should return to Mrs. Rachel Griffin; that the lease was signed A. A. Griffin, trustee. It has been lost or destroyed; that the land he leased was a part of the land in dispute here. Upon cross-examination, the witness says that he married Mr. Harby's mother; that he does not know of his own knowledge whether A. A. Griffin owed any debts or not.

George W. Hampton testifies that Mrs. Rachel Griffin is his aunt; has known her since he can remember; that he lived in the family before they moved here, and has lived with them here; that he visited to Florida in 1855, and moved in 1856; that he brought J. L. Griffin to Florida in his buggy in the spring of 1855, after the crop was planted and growing; that he does not remember any talk then between them as to the land; that he thinks all the prop-

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

erty J. L. Griffin had was a pair of horses and a buggy; that Leroy Griffin agreed to take the Easter place, and employed him to build a house on it; that he did not furnish it; that J. L. Griffin never moved there; that he died on Christmas day, 1856, at his mother's place; that A. A. Griffin paid him for the work; don't know where he got the money from; that he took J. L. Griffin's word for it, for I knew he could get it any time from his mother; that he (J. L. Griffin) told him (Hampton) that he (J. L. Griffin) did not have any money, but that he would get it and pay him; that he has never heard J. L. Griffin say anything about the property; has heard A. A. Griffin say that everything belonged to his mother. Upon cross-examination this witness says that his uncle, Hardy Griffin, furnished the house; that he hired Whitus, and Jesse W. Walker was an apprentice under him at the time; that he does not know whether the house was completed when J. L. Griffin died; that he put \$36 worth of work on the house, and his uncle, Hardy Griffin, managing for his wife, finished the work; that A. A. Griffin was trustee, but his uncle did the managing; that he does not know whether J. L. Griffin had any cash, notes or mortgages when he came to Florida, but don't think he did.

John W. O'Neal testifies that J. L. Griffin, who was his guardian, stated to him that he himself had nothing except his horse and buggy, but that he would give a good bond. This conversation was had when his appointment as my guardian was suggested; that he boarded with Mrs. Rachel Griffin, and J. L. Griffin likewise lived with her also. Witness was about fifteen years of age when J. L. Griffin died.

E. E. Barclay testifies that he knows the parties; has been in Madison county twenty-four years next February; that Hardy Griffin came in the November before; that he

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

conversed with Mr. Linton about the trade; that Mr. Linton stated that he understood that Hardy Griffin was insolvent; that he had made a trade with him; that he was fearful as to the payment; feared that the mortgage was worth nothing, as he understood that the property was trust property; that afterwards Linton told him that he had succeeded in "recanting" that trade, but he had let Mr. Griffin have a portion of the lands; that he had made the deed to A. A. and J. L. Griffin, as trustees for Mrs. Griffin, and had taken their mortgage. He states that Hardy Griffin told him that the property belonged to his wife and children, not subject to his debts. This, when he threatened to sue him for a debt which occurred in 1857 or 1858; that A. A. Griffin told him that what his father said was true; that his mother would pay him the money, and if she did not he would for her; that he had at different times business transactions with A. A. Griffin; always told him that he was managing the trust; that he has no interest in the world in this suit. The cross-examination of this witness elicited nothing, and in a subsequent cross-examination he stated that his conversation with A. A. Griffin was in the fall of 1857.

W. D. Griffin, who is the brother of A. A. Griffin and J. L. Griffin, testifies that A. A. Griffin considered the property his mother's, and did the business as trustee; has heard that A. A. Griffin owed debts at his death; that he did not consider that A. A. Griffin owned the land described in the deed to him, of the 22d September, 1874. The rest of his testimony concerns, principally, the matter of the division and the character of the land. He says he is the trustee for the children of A. A. Griffin, his brother.

Z. T. Hines, the husband of S. Janie Hines, who received one share in the division, swears that he is satisfied with what they got.

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

Mrs. N. A. Hampton, who is the sister of Sarah E. Cox, who married J. L. Griffin, and the aunt of J. Leroy Gale, the defendant in this case, who insists upon an interest equal to one-half of this property. She says that she has known Mrs. Rachel Griffin, A. A. Griffin and J. L. Griffin, since 1852; that Mrs. Rachel Griffin owned property left her by her father as trust property; that Judge A. Y. Hampton was trustee; heard him say before she was married that he afterwards transferred the trusteeship to A. A. and J. L. Griffin; that she was not present at said transfer, but knows about the time it was done; that Judge A. Y. Hampton was insolvent and was growing old; he did not like to attend to the business; and also because the Griffin family was coming to Florida; that she has heard J. L. Griffin say he was managing the Linton lands, as trustee for his mother; that Judge A. Y. Hampton has told her repeatedly that A. A. and J. L. Griffin were trustees for their mother; that J. L. Griffin told her father in her presence in September, 1856, that he was acting as trustee for the lands in Florida, bought with the money for which the lands in Georgia were sold; that she is confident J. L. Griffin had no other property but the trust property, except the property he got by marriage, which consisted of a negro man, woman and three children; that her father said he would give each of us \$3,000 worth of property in negroes, which was the amount I got, and I am confident J. L. Griffin got no more; that J. L. Griffin had no property when he came to Florida, except the negroes above mentioned and a buggy and two horses, and when J. L. Griffin died his father-in-law, Mr. Cox, came to Florida and carried back to Georgia these negroes, and everything he had given his daughter, the wife of J. L. Griffin; that the land she refers to is the land in dispute here; that she has no interest in the suit, and that J. L. Griffin and her sister mar-

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

ried, she thinks, in February, 1858. Cross-examined, she says that the money that the Lawrence county land sold bought the Dougherty county land, and the money Dougherty county land sold for bought these Florida lands; that she saw no money change hands in these transfers; that she heard Judge A. Y. Hampton, her husband's father, who was the former trustee, say these things; never saw any of the business transactions in reference to the transfer of these lands; that she does not remember seeing any of the deeds transferring any of this property; that she had in her possession a paper which she destroyed, making L. Griffin and A. A. Griffin trustees; that she does not know whether it was a copy or the original, and does not remember by whom it was signed; that she did not receive the whole of the paper; that it was found among the papers of A. Y. Hampton; and that she does not remember any of the names that were upon the paper, except the names of J. L. and A. A. Griffin; that the paper read transferring the property of Mrs. Rachel Griffin to the said as trustees, from Judge A. Y. Hampton, the former trustee.

The foregoing embraces substantially the testimony of the plaintiffs.

For the defendants:

Joseph Bishop testifies that he knows the lands sold by Linton to the Griffins, he thinks some twenty years ago; that he did all the hewing on a double-framed house in Lee Griffin's name, on the Easter place; that J. L. Griffin said it was his place; that he, J. L. Griffin, sent him word by his father to get him 12,000 shingles; that when the shingles were ready he sent a note to J. L. Griffin for the money; that Hardy Griffin came with a wagon and paid him \$20 for J. L. Griffin, who was sick at the time; that a short time afterwards he went to get the balance of the money and met Hardy Griffin and Arch Griffin, and Har-



---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

Griffin told him that as soon as they could haul some cotton to the Monticello factory they would pay him the balance of the money; that Lee Griffin died pretty soon; that shortly after this he saw Arch Griffin, who told him that he would have to wait until an administrator was appointed, and that Mr. Hardy Griffin, as Lee Griffin's administrator, told him that Lee Griffin's estate was worth nothing; that he did not get the balance due him; that he never heard Lee Griffin say that the property was his and Arch's, but that Lee Griffin said that the place he was working on was his. I have heard Arch. Griffin, since the war, say that everything on the place was his; that during his (A. A. Griffin's) last illness he tried to sell me two forties of the land; that he wanted to sell it on account of the taxes. Upon cross-examination, he says that he has heard that the property was Mrs. Rachel Griffin's, and has heard differently; has heard Arch Griffin say before executions issued against him that the property was his, and after executions issued he said it was his mother's.

Charles F. Bemis for defendants. This witness says he moved to Florida in 1862, and commenced merchandizing in 1865; that he knew Hardy Griffin, but did not know J. L. Griffin; that he sold goods to A. A. Griffin in 1865 and 1866, individually, to the amount of \$1,000, which he settled. His account then ran for years, payments being made from time to time. The account was for general supplies. He lived on a part of the land and attended to the whole plantation; that he made an exchange of land with Arch. Griffin for a part of the Linton lands, with Hardy Griffin's consent, for the reason that Hardy Griffin said he could not make a title, but Arch Griffin could; that some years after this land transaction A. A. Griffin made some statement to him about this trust property, but not at that

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

time. After the years '65 and '66 accounts were opened with Mrs. Rachel Griffin, W. D. Griffin and A. A. Griffin, individually as well as trustee, and continued for years; that at one time he intimated to A. A. Griffin that he would subject the property for the debt, and that Griffin said that it did not make any difference, that he intended to pay me, "that the trust was not worth a d—n anyhow." This is all that is material of the testimony of this witness.

John M. Beggs, Clerk of the Circuit Court for Madison county, for the defendants. He produces a list of unsettled judgments against A. A. Griffin, from the years 1856 to 1866, inclusive. These judgments are for various amounts, and show that A. A. Griffin was considerably in debt during the time mentioned. The objections taken to this testimony may be divided into two classes: First, as to the competency of some of the witnesses who are parties to the suit when they speak to any transaction or communication between such witness and the person at the time of such examination deceased, against the heir-at-law of such deceased person. J. Leroy Gale here is the heir-at-law of J. L. Griffin. She is the defendant whose interests are primarily concerned, and it must be obvious that the testimony of any party to this cause which purports to speak to any transaction or communication between such party and her father, J. L. Griffin, touching the subject matter of this suit, is inadmissible. The statute prohibits the *examination of a party* to such transaction or communication against the heir-at-law. Whether, under the peculiar circumstances of this case, the *examination* of a party as to the transactions and communications between such party and A. A. Griffin is prohibited by the statute, we deem it unnecessary to determine, because, treating the subject as though it was inadmissible, our conclusion is the same.

---

---

*Gale et ux. v. Harby et als.—Opinion of Court.*

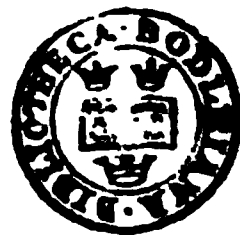
---

---

The next class of objections relate to the character of the testimony itself, such as that there is no evidence as to who was the purchaser of the lands in Georgia; that there is no deed produced; nothing to show in whose name the investment was made; that no precise sum of money is shown to have gone into the Madison county lands.

That these objections exist to the character of the testimony of the plaintiffs is true, but we think that there is sufficient legal evidence here, independent of these objections, to establish the trust and to show, independent of the question whether Mrs. Rachel Griffin had any interest in the lands or not, that the parties have the equitable interest which they claim, to wit: a one-sixth interest in the land.

We think that the only reasonable deduction from the evidence is, that at the death of Andrew Hampton Hardy Griffin and Rachel Griffin were in reduced circumstances, Hardy Griffin having been pursued by debt from State to State and his property sold under judicial process; that the money and the property brought by these parties to Florida belonged to the trust created by the will for the benefit of the grand-children of Andrew Hampton, the children of Hardy and Rachel Griffin; that the first sale by Linton to Griffin was rescinded after an arbitration, and that the primary cause of it was knowledge by Linton that Hardy Griffin had nothing except property belonging to the trust; that the cash purchase money paid to Linton was derived from the trust land; that such fact was known to A. A. and J. L. Griffin; that A. A. and J. L. Griffin, at the time of the purchase from Linton, paid no money of their own; that their act was intended by them to be in pursuance of the trust; that the property which they had was small, and that some of it was appropriated to the payment of the trust debt, but that the debt was paid through the cultivation of



---

Gale et ux. v. Harby et als.—Opinion of Court.

---

the land by the labor of slaves belonging to the trust fund; that A. A. and J. L. Griffin admitted the investment of the trust fund at the time it was made, and that A. A. Griffin admitted it for years afterwards; that the general conduct of every member of the family, including the mother of defendant, plaintiff, has been upon the hypothesis of a trust as to this property for many years, and that whatever may have been the nature of casual and thoughtless remarks to others not particularly concerned by A. A. Griffin as to this property the general nature of his acts and admissions as to this property, through a series of years, involve the conclusion that he knew and admitted that the property was neither his nor his brother's, and that all of the adult parties have consented to and had a division of the property based upon the existence of the trust; have made improvements upon their several properties and have for years occupied them in subordination to the trust, and we think the law of evidence as applicable to the proof here sustains our conclusions. It consists largely of admissions of A. A. and J. L. Griffin sworn to, not by one, but by several disinterested witnesses, and circumstances corroborating those admissions. There is no proof that the purchase was made on the credit of A. A. and J. L. Griffin, and the evidence discloses not one cent paid by J. L. Griffin on the purchase, nor did any of his property aid in the cultivation of the land by which the debt was paid. Land is not self-productive of the articles by the sale of which this debt was paid. Upon his (J. L. G.'s) death, his brother, A. A. Griffin, his administrator, and, as is claimed by J. Leroy Gale, her father's co-tenant in fee, did not claim such interest in J. L. Griffin as his heir now claims. Indeed there was no such claim made by any of the children or the family until after the institution of this suit when it is made by his heir, who has arrived at the age of twenty-one since the in-

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

stitution of this suit, and the claim is made upon the fact that the deed was absolute, and there is no express trust shown as against her father and without any evidence of any party who knew anything about the trust funds in Georgia or the arbitration resulting in the deed from Linton to A. A. Griffin and her father, or the nature of the contract. Admissions by A. A. and J. L. Griffin sworn to by several disinterested witnesses and corroborated by testimony showing the facts mentioned above, we think is evidence of the highest character. Perry on Trusts, §137, and cases cited to note 3.

The financial condition of persons, who themselves assert, or through whom others assert a purchase in their own right as against those who claim that it is made with trust funds or with funds belonging to them, is a fact to which courts of equity universally give weight in investigations of this character. Such has been the rule from the case of *Willis vs. Willis*, 2 Atk., 71, in 1740, to this time. In that case, and it was the case of a resulting trust as this is, Lord Hardwicke said, speaking of the statute of frauds: "There is another way of taking a case out of the statute, and that is by admitting parol evidence within the rules laid down in this court to show the trust, from the mean circumstances in the pretended owner of the real estate or inheritance which makes it impossible for him to be the purchaser." *Wilkins vs. Stevens*, 1 Y. & C., Ch. Ca., 431; *Lench vs. Lench*, 10 Ves., 518; *Benger vs. Drew*, 1 P. Williams, 780; *Strimpfler vs. Roberts*, 18 Pa. State, 283; *Baumgartner vs. Guessfield*, 29 Mo., 36; *Farrell vs. Lloyd*, 69 Penn. State, 239; *Sayer vs. Frederick*, 1 C. E. Green, 205; *Gascoigne vs. Thwing*, 1 Vroom, 366; *Mitchell vs. O'Neil*, 4 Fev., 504.

While the precise amount realized from the trust fund in Georgia and brought to Florida, and the exact amount

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

of the first payment made to Linton is not established, yet the general facts that the funds brought were trust funds and that the payment made was from them, is established by the testimony of disinterested parties who knew the circumstances of the parties in Georgia, and when they came to Florida. Mrs. Griffin's testimony is for the most part admissible here.

Upon the merits therefore we think the decree correct.

What has been said disposes of the first, second, seventh, eighth and ninth grounds of appeal. The third ground of appeal is because the complainants ought not to have been allowed at the hearing of the cause upon its merits to amend their bill, so as to present an entirely different cause. We have read the original bill carefully several times and can perceive no necessity for its amendment. The claim is for the equitable interest of the plaintiffs and the investment of the trust funds with the knowledge of the trust is set forth. The will of Andrew Hampton is set forth, and the estate which they have under it is what they demand. That they made a mistake as to the interpretation of Mrs. Rachel Griffin, is not material. While their interpretation of the will as to this matter is incorrect, still the facts set forth entitle them to the relief prayed, it is sufficient. Nor do we think that the amended bill makes a different case. The amendment by adding an allegation that the taking the deed in the name of A. A. and J. Griffin was through accident, fraud or mistake, is mere surplusage. Plaintiffs had already stated the facts, and whether it was an accident, fraud or mistake, was a conclusion which could well have been omitted. So, also, whether Mrs. Rachel Griffin did or did not know how the deed was made, was entirely immaterial. Her knowledge as to the form of the deed could neither create or destroy the trust.

---

---

Gale et ux. v. Harby et als.—Opinion of Court.

---

---

The fourth ground is because if the bill is to reform a deed it is not between the proper parties. The bill is not a bill to reform a deed, but to establish an equitable title to the subject matter of the deed and against the deed.

The fifth ground is because the general charges of fraud, accident or mistake, as made in the bill as amended, are too indefinite to sustain the cause; no specific acts of accident, fraud or mistake are alleged or proven. Such an allegation as this is as a matter of course not good pleading, but where the facts constituting the equity are set up, to state a legal conclusion is unnecessary, and if stated is simply surplusage, unnecessary and immaterial matter.

The sixth ground is because the bill for partition was filed March 21, 1878, the amendments alleging fraud, &c., were made October 4, 1879, both of which were more than twenty-two years after the said deed was executed and the said claim is stale and is barred by the statute of limitations. The case presented by this record is that of a purchase with trust funds and acknowledgment of use of the subject matter as trustee for the time specified. There is nothing adverse here. Those who were and are in possession acknowledge and have always acknowledged the relation and claim of the plaintiffs under the will. The stale claim or the new claim is that of the defendant J. Leroy Gale, who for the first time now denies the existence of the trust which all of her ancestors who knew anything of the matter, including her mother, have acknowledged for over twenty years.

The decree is affirmed.

---

---

Nims v. Nims—Statement of Case.

---

---

A. S. NIMS, APPELLANT, vs. C. E. NIMS, APPELLEE.

1. When a reference is made to a master to take and state a partnership account, the report should state the account in such manner that the court may judge whether it is correct. It should set out the account at length and his findings so that they will be intelligible, and that the court may see the correctness of the master's inferences.
2. A master's report that he finds a balance in favor of a partner in book A, and a balance against him in another book, is not an intelligible statement of an account, showing whether it is correct or not.
3. A stipulation that an order confirming a master's report, no exceptions having been filed, shall be set aside on the final hearing if it be made to appear that there are grounds of exceptions to the report; and if appearing that the report is not correct nor intelligible, the order of confirmation should be vacated and exceptions allowed to be filed.
4. On a bill to dissolve a partnership and for an accounting, the bill of a co-partnership should be decreed before the defendant is required to account.
5. A final decree as between partners ought not to be made until debts of the concern are ascertained and adjusted.

Appeal from the Circuit Court for Leon county.

This is a bill filed by C. E. Nims against A. S. Nims alleging a partnership in the business of running a saw mill, and selling lumber. The bill prays a dissolution of the partnership, an accounting and a decree for whatever may be due. The answer in terms denies every material allegation in the bill, but shows facts substantiating the existence of the partnership and insists that there were profits, but losses, and that nothing is due complainant.

A reference was made to a master to take testimony as to the existence of a partnership and also to take testimony



---



---

Nims v. Nims—Statement of Case.

---



---

and take an account of all the transactions of the parties referred to in the pleadings and make report.

The master made a report which was duly filed and no exceptions being filed by either party within one month, under equity rule eighty-four the report stood confirmed, and the cause was set down for a hearing and final determination before the Chancellor on December 28, 1882. On that day it was agreed in writing by the respective solicitors, as follows: "That if at the time set for the hearing the defendant could produce any grounds for a review of the report which would have been good as exceptions thereto had they been filed as such before the report was confirmed, the confirmation of the report should be vacated and both parties permitted to file exceptions, but if no such sufficient grounds were produced, the order confirming the report should stand as final." On the same day the defendant filed a paper which was in the form of exceptions to the report of the master.

The master had reported a large sum due the complainant from defendant, and that a quantity of land, a mill, mules, wagons, carts, &c., were remaining assets of the partnership.

The following is the account as stated in schedule annexed to the report:

General summary of books kept by A. S. Nims—	
Book A shows credit to mill.....	\$ 514.04
Book B shows credit to mill.....	4,636.97
Book C shows credit to mill.....	969.80
	<hr/>
	\$6,120.81
Book D shows debit against mill.....	381.44
	<hr/>
Total amount to credit of mill.....	\$5,739.37
Edgar Nims' interest in above amount, one-half.....	2,869.63
Credit by Edgar Nims' account.....	1,050.66
	<hr/>
Amount due Edgar Nims as shown by above.....	\$1,818.97



---

---

Nims v. Nims—Statement of Case.

---

---

3. It is not accompanied with an account of debit and credit posted in ledger form from the journals or blotters of the business books of the parties to this suit as is alone customary in the rendition of mercantile accounts.

4. That no account accompanies the report of the assets put into the business in controversy by either or both the partners thereto.

5. The summary statement of balances accompanying said report are in no wise "an account taken or rendered" as puts the true relation of the litigants in an attitude to be comprehended by the court or commented upon by counsel, but is a mere arbitrary statement of assumptions insusceptible of analysis or review.

And other grounds were stated in the proposed exceptions. Wherefore it was urged that the Chancellor ought to return the report to the master with instructions to correct it in form and substance as suggested, and to conform to the order of reference.

On the first day of January, 1883, the Chancellor decreed a dissolution of the partnership, and that the copartnership property be sold.

On the fifth a final decree was made as follows: "This cause came on for final hearing the 5th day of January, 1883, and was argued by counsel, and therefore upon consideration thereof it is ordered, adjudged and decreed:

"First. That the defendant has produced no grounds under the agreement of counsel herein filed on the 28th day of December, 1882, or otherwise, sufficient to entitle him to have the order confirming the master's report in this cause vacated, which was entered under rule 84 of the rules of pleading and practice of this court, and that he shall not be permitted to file exceptions to said report, and that said report be in all things confirmed.

"Second. That the copartnership heretofore existing be-

---

---

Nims v. Nims—Opinion of Court.

---

---

tween the said plaintiff and defendant be dissolved, and said defendant be enjoined from continuing longer to operate said mill and from selling any lumber which he may now have on hand either at said mill or at the lumber yard at Tallahassee.

“Third. That the plaintiff is entitled to a one-half interest in the following described property reported by said master to belong to the said copartnership, viz: nine mules, two log carts, one one-horse cart, two wagons, the iron mill, engine, boiler and appurtenances thereto belonging, and eight hundred and forty acres of land in Wakulla county, particularly described in a deed accompanying said report, and one-half of the proceeds of the sale of said property when sold by master in obedience to an order heretofore made in this cause be paid to the plaintiff.

“Fourth. That the defendant do pay to the plaintiff the sum of three thousand five hundred and seventy-four dollars and twenty-nine cents on the 6th day of February, 1883, together with interest until paid, and on failure of his so doing executions do issue against him as at law for the whole of said amount or any balance thereof which may remain unpaid at said date.”

The defendant appealed.

*John A. Henderson* for Appellant.

*D. S. Walker, Jr.*, for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

The master's report does not state an account in such form that it can be determined from it what amounts were advanced or paid by either party on account of conducting the partnership business or for account of the purchase of the land, machinery, mules, carts, provisions, wages, taxes,

---

*Nims v. Nims—Opinion of Court.*

---

&c., mentioned in the pleadings and as to which testimony was taken; nor does it show what amount of lumber, either by measurement or value, was sold or disposed of by either party, nor how much of it remains on hand in the possession of either party, if any.

The report fails to show what became of the crops of corn, cotton, &c., raised by complainant on the lands of the parties and by the labor of the hands and teams belonging to the parties as alleged in the answer and in regard to which proof was taken, or how the proceeds were disposed of. The report only shows as to the partnership transactions, the difference that appeared between the debit and credit side of the accounts kept by each party with the "mill," with no data whatever by which it can be determined that the books and accounts related to the joint business of the parties, nor what items were allowed or what rejected.

As to the several items of indebtedness of A. S. Nims to C. E. Nims, which had accrued prior to the commencement of the joint business allowed by the master at \$2,281.97 against A. S. Nims, there is no charge in the bill of the items comprised in this amount as the basis of a decree or judgment, and the prayer of the bill does not demand judgment upon them. It is merely stated in the bill that the amounts had never been paid by A. S. Nims, for the purpose of showing that he had not been in very prosperous circumstances before this lumber business was entered into between the parties. The report includes the amount as "amounts paid by C. E. Nims," and adds it to the balance due on partnership account. According to the testimony of A. S. Nims, defendant, these items (so far as they are proved, with one or two exceptions,) should have been credited to A. S. Nims in the account, and charged against A. S. Nims, as so much advanced by C. E. Nims on account of

---

 Nims v. Nims—Opinion of Court.
 

---

the joint business, to be disbursed by A. S. Nims in the purchase of stock, property and supplies for the joint business for which, when disbursed, A. S. Nims had credit in his account against the mill.

One of the items, "amount paid by C. E. Nims on engine \$200," is allowed as indebtedness of A. S. Nims to C. E. Nims. This allowance is wrong on the face of it. It was money paid, according to complainant's statement, on the purchase of an "engine, saw, mill, carriage and boilers," for the use of the joint business. This should be a charge against the partnership concern and not against the defendant.

Further criticism of the report is unnecessary. This report is not intelligible upon its face for the reasons stated and for other reasons which will appear by an examination of the books and accounts which have been sent up for inspection and have been examined.

The result of the account should be stated in such manner as to afford the court the means of judging whether it is correct. 2 Dan. Ch., 5th Ed., 1301, n. 2; Robertson Baker, 11 Fla., 192; June vs. Myers, 12 Fla., 310.

"All parties accounting before a master shall bring their respective accounts in the form of debtor and creditor." Eq. Rule, 80.

When a report is made upon accounts exhibited to the master such accounts should accompany the report that the court may see the correctness of the master's inference. Jeffreys vs. Yarborough, 2 Hawks, 307.

The master should state the account at length and set out the facts found by him, so that they will be intelligible without reference to the testimony. Herrick vs. Belknap, 27 Vt., 673.

He should state what items are allowed and what disallowed. Reed vs. Jones, 15 Wis., 40.

---

---

Nims v. Nims—Opinion of Court.

---

---

His report should so present the items that exceptions may be taken to it. *Ransom vs. Davis*, 18 How., U. S., 295.

The report of a master stating the accounts of a mercantile firm should show whether the partnership resulted in a profit or loss, and to what extent. *Zimmerman vs. Huber*, 29 Ala., 379; *Hicks vs. Chadwell*, 1 Tenn., Chy., 251.

This report is not a proper basis of final decree, because a final decree ought not to be made until the debts of the concern are ascertained and adjusted, (2 Dan'l Chy., 5th Ed., 1250,) unless the partner in advance will deduct the amount of the debts from the amount due him. *Tyng vs. Thayer*, 8 Allen, 391.

In taking such accounts, the partnership books must, if not successfully impeached by the pleadings and proofs, be taken as *prima facie* correct; and if lost or destroyed the best evidence is proof of their contents. *Hicks vs. Chadwell*, *supra*.

The foregoing cases are cited in 2 Dan. Chy., 5th Ed., 1301, n. 1.

It seems clear from the authorities that under the written agreement of counsel the order confirming the master's report "should be vacated and both parties permitted to file exceptions," it appearing that sufficient grounds were shown "for a review of the report" upon exceptions tendered.

We find in the record no decree that a copartnership existed between the parties.

This was doubtless an inadvertence, as it seems the court finally decreed a dissolution.

The existence of the partnership should be found and decreed before ordering an accounting. "It involves the whole merits of the case, since such a reference can never

---

---

Brokaw v. McDougall et als.—Syllabus.

---

---

be made until the defendant is found by the court to bound to account, and that is the question to be decided the hearing.” *McLin vs. McNamara*, 1 Dev. and Bat. E 407, Ruffin, C. J.

The final decree and the decree of January 1, 1883, reversed and the cause remanded with directions to ter such decree as to the existence of the partnership may appear to the Chancellor to be warranted by the pleings and testimony, and thereupon, if a copartnership found, to refer the other matters in issue to the same some other competent master for a more complete re upon the testimony already taken, or that further testim be taken if deemed necessary to a full investigation a understanding of the matters of controversy, and for su further proceedings as may be had in accordance with rules and practice of the court.

---

ELIZABETH A. BROKAW, APPELLANT, VS. ALEXANDER M DOUGALL, ET ALS., APPELLEES.

1. When a bill filed by heirs at law against a widow for partition land contains an alternative prayer that the widow be required to elect whether she will “take dower or a homestead,” a murrer that the bill does not state a case authorizing such relief ought not to be allowed if the case made by the bill sustains a material prayer for relief.
2. A widow, not an heir of her husband, and who has elected to take dower, cannot claim a homestead in the lands of her husband under the homestead clauses of the Constitution. Her right is that of dower only, which is not affected by the homestead provisions.
3. The homestead of a testator residing in this State, who dies leaving



---

---

**Brokaw v. McDougall et als.—Statement of Case.**

---

---

a wife and children, is not the subject of testamentary disposition. Such property remains as though no will had been made, and descends to the heirs subject to the right of dower.

4. A report of commissioners allotting dower, which by mistake sets apart to one of the parties land not embraced in the bill, should be set aside and recommitted for correction and a proper allotment.
5. Commissioners in partition report that they have allotted to the widow the house buildings and improvements with ten acres, and to the two children of decedent fifty or sixty acres each, without buildings, and that in their judgment the division is "equal, equitable and fair," but make no estimate of value or productiveness. On motion to set aside the report, affidavits of two citizens were filed in support of exceptions to the report, who agree that the value of the share allotted to the widow is six thousand dollars, and that of each child about six hundred dollars, and no other testimony as to value was before the court: *Held*, That *prima facie* such division is manifestly unjust to the children, and a decree setting aside the report will not be disturbed.
6. When commissioners in partition take testimony for the purpose of ascertaining the value of property to be divided, they should return the same to the court so that the court may determine as to the correctness of their report. And when testimony is to be taken the parties should have notice so they may be present, by themselves or agents, it being a judicial investigation affecting their interests.

Appeal from the Circuit Court for Leon county.

Peres B. Brokaw died leaving surviving him his widow, who is the appellant, and three children, Phoebe, Eliza and Abram. Abram died before the commencement of this suit, unmarried, without issue and intestate. The children of Peres were the issue of a former marriage. By his will he gave his property to the widow and his three children, share and share alike; providing, however, that on the death of the widow her share should go to the children. The widow was named as executrix, and qualified as such August 5, 1875. The bill was filed by said Phoebe and her

---

---

**Brokaw v. McDougall et als.—Statement of Case**

---

---

husband, Alexander McDougall, and by Eliza by a next friend, against appellant in her own right and as executrix, and alleges in addition to what has been stated that the testator was seized and possessed of a quarter section of land in Leon county, Florida, "on which the residence in which he died was located and which he occupied and enjoyed as a homestead for several years prior and up to the time of his death;" and also of a town lot in the city of Tallahassee; and that the executrix by virtue of powers contained in the will has sold a part of the quarter section of land, and accounted for the proceeds in her settlement with the Probate Court; that the balance of said quarter section and said town lot are all that remains unsold of the testator's real estate, "and that the defendant after the payment of his (testator's) debts by the terms of the will was entitled to one-fourth share thereof for the term of her natural life, and Abram, Phoebe and Eliza each was entitled to one undivided fourth share thereof in fee simple, and to the like interest in the remainder after the death of the defendant, in her life-estate," and that Abram having died said Phoebe and Eliza are each entitled to one undivided half interest in his share of the estate.

It further alleges that the widow filed in the Probate Office a written dissent as to the provisions made for her in the will and in such dissent claimed "all rights of dower and of homestead, and all other rights to which under the laws of Florida, and the Constitution thereof she, as the wife and widow of Peres B. Brokaw, is or may be entitled"; and the bill states that she made no election of a "child's part" and charges that she "is confined to dower or the right of homestead" and not to both as she has claimed, and that she should be put to her election, and alleges that said Phoebe and Eliza are each "seized in fee simple of an undivided half interest in said homestead lands of said es-

---

---

**Brokaw v. McDougall et als.—Statement of Case.**

---

---

tate," and "subject to the defendant's right of dower or of homestead therein for the term of her natural life as she may elect." The bill prays "that the defendant may be required to elect to take either her dower or a homestead in said real estate," and if she elects to take dower that the same may be assigned to her, and that the balance of the real estate may be divided between said Phoebe and Eliza; "or if the defendant elects to take the homestead which accrued to the heirs of P. B. Brokaw that the commissioner be directed to ascertain the quantity and identity of the land to which said homestead right may attach, and having ascertained the same to divide, separate and allot one-third part thereof in quality and value to the defendant, to be held and enjoyed by her for her natural life, and that they divide and separate the other two-thirds and allot one-half" to Phoebe and the other half to Eliza, "to be held and enjoyed by each of them and their heirs in severalty," and for general relief.

The defendant, Mrs. Brokaw, demurred to so much of the bill as prays for an election between taking dower or homestead in the real estate on the ground that the bill states no such case as entitles them to this relief; and answered as to the residue thereof. The answer "insists that under the laws of Florida she is entitled to hold all that remains unsold of said quarter section and of said lot \* \* in Tallahassee which adjoins said quarter as a homestead or so much of said lot as, with what remains unsold of said quarter section, will make the quantity of land to which, under the laws and Constitution of the State, she is entitled as a homestead, with the exception of so much as may be assigned to her as dower;" and "that she is entitled to both homestead and dower in said property and in the property of her said husband; not merely \* \* to one or the other," and "that she should not be required to make her election

---

---

Brokaw v. McDougall et als.—Argument of Counsel.

---

---

between the two.” The answer further states that at the death of the testator said city lot was the only piece of his real property not under mortgage, except another lot which has been sold by her under the will. That her other real and personal property were under mortgage to the extent of their full value, except the homestead which was mortgaged for \$1,000. This mortgage on the homestead she holds by assignment as security for money paid thereon out of her own funds and earnings.

The answer further says that the “unsecured indebtedness” of the testator remains nearly or altogether unpaid because of the insolvency of the estate; and states she “is willing to have her dower assigned and set apart to her \* \* said dower to include the dwelling-house and outhouses of the deceased as provided by law, and is willing to have the other portion of said land to which she and the surviving children are entitled set apart and apportioned among them or sold for partition.” She does not concede that Phoebe and Eliza are entitled to more than two-thirds. She claims one-third “inasmuch as Abram neither claimed nor established any right to homestead during his lifetime.”

The other facts are sufficiently stated in the opinion.

*R. B. Hilton* for Appellant.

1. The theory of complainants upon which their bill is based is that the widow had the right to either dower or homestead, as she might choose, and could be put to an election between the two. The contention of defendant is that she is entitled to both homestead and dower. The decision of the Chancellor is against both these positions, to-wit: that her only rights are as dowress. And the ruling of the Supreme Court at its last term and after the decree

---

---

Brokaw v. McDougall et als.—Argument of Counsel.

---

---

of the Chancellor in this case, and after this appeal had been entered, to wit: in the case of Wilson vs. Fridenburg, from Duval county, would seem to confirm the views of Judge Walker, and to set the matter at rest. But as far as I have been able to ascertain their sentiments both these decisions were a surprise to many members of the profession. This, together with the other fact that Judge Walker's decision had been appealed from before the ruling of this court in the case from Duval, is my excuse for most humbly and respectfully asking a reconsideration of the matter involved.

It is submitted with great deference, that the court is not constrained by the terms of the Constitution to limit the right of homestead to the class of persons coming under the designation of *heirs* as defined by the common law.

The court, which takes judicial knowledge of the political history of the country, and especially of events so memorable as the framing of the State's organic law, will take cognizance of the qualifications and mental training of the men who composed the Convention of 1868. The court will therefore know that the members of that body not being lawyers but laymen, are likely to use this word "*heirs*," not in its technical common law sense (which is even different from its meaning in the civil law,) but in its popular sense by which is understood all those who, by statute or testamentary devise, share in the partition or distribution of a dead man's property. I have, myself, no doubt but the members of the Convention, in framing and adopting the homestead clause of the Constitution intended to classify together widow and children of the deceased, and to embrace them all, under the term "*heirs*." What reason can be imagined why they should have been more careful of the interests and welfare of children than their mother; of sons and daughters than of the bereaved wife

---

 Brokaw v. McDougall et als.—Argument of Counsel.
 

---

and widow? Yea, more, can it be conceived, and we are forced to that, if we adhere to the technical sense of the word, and a strict, literal construction of their language that they were careful to bestow benefits upon the husband's relations to the hundredth degree, at the expense of his creditors, and yet willing to see the dearest object of his affections turned out of house and home. But it is said the widow is provided for by the law of dower, and our statutes. I reply that she has no *guaranty of dower under the Constitution*. That which the statutes give, the statutes may take away. There is nothing to prevent the Legislature of this State, as has been done in many other States, from depriving the wife of dower in any property alienated by her husband in his lifetime, either with or without her assent. The spirit and motive of all Constitutional homestead laws is especially a provision as to guaranty of a home for the wife and widow and children and inmates of the home and house, of the husband and father.

But I maintain that it is no strained construction of the terms of the Constitution to extend its homestead exemption so as to include the widow. "An heir," says the Supreme Court of Kansas, (*McKinney vs. Stewart*, 5 Kan 384,) "an heir at law is simply one who succeeds to the estate of a deceased person. In this sense the wife is an heir of her deceased husband." And our statute sets forth under what circumstances the wife (widow) shall be so heir at law. By the acts both of November 7, 1828, and February 8, 1838—acts in force at the time the Constitution was framed—she is given the right of inheritance both as regards personalty and realty. McClellan, p. 47 "Statutes relating to homestead, when the language used departs from the manifest intention of the Legislature, w

---

Brokaw v. McDougall et als.—Argument of Counsel.

---

not be taken literally.” Thompson on H., Secs. 7 and 8; Heard vs. Downer, 47 Ga., 631.

Though not all the decisions of the States affirm the widow's right to both dower and homestead, yet much the larger number of those ruling on it have so held, and of the States whose courts have so decided several are of the highest authority. Thompson on H., Sec. 555, *et seq.*

And it makes no difference as to the widow's rights in this respect, whether she elects to take under the will of her husband or not. Thompson on H., 911; 25 Pa., 33; 3 Ohio, 369, 375.

Is there any example of a homestead law which, providing for the children, leaves their mother unprotected and at their mercy?

I have alluded to her dower rights. But suppose the case of common occurrence, both in England and this country, of a woman who in contemplation of marriage accepts a settlement in lieu of dower, and who afterwards by joint deed of her husband parts with the settled property. The husband afterwards dies insolvent; she has no dower; her children have a homestead; she has nothing. They may turn her out of house and home; for unless she is protected by the constitutional provision which, I must think was intended; in cases where she and her husband were in the enjoyment of a home at the time of his death, to secure such home to her, quite as much to *her* children as his.

The conclusion reached by this court in the Wilson case, *supra*, was, I think, unquestionably correct. In that case the widow and executrix, under order of court, made in a case in which the children were not parties, mortgaged the homestead. In proceedings for foreclosure the children's claim on homestead was sustained in opposition to the mortgage; and I say rightly sustained. When the court went further and held that under our Constitution she has no

---

 Brokaw v. McDougall et als.—Argument of Counsel.
 

---

homestead rights other than the power to prevent the alienation of homestead during coverture, I respectfully submit that this was *obiter*, not being a point necessarily involved in the decision of the case.

A Bolognian law enacted that "whoever drew blood on the streets should be punished with the utmost severity." But this law was held not to extend to the surgeon who opened the vein of a person that fell down in the street in a fit.

In other words, a law enacted to punish an act endangering life should not be construed to make it criminal to preserve life.

The court will force language out of its literal meaning rather than do wrong to a man's widow, as in *Gibbon v. Gibbon*, 40 Ga., 575, in which her Supreme Court said: "By the laws of Georgia the wife is expressly made the heir of husband. If there be no children, she is the sole heir, and if there be children she is one of the heirs. A man's heirs are those who by law take his property on his death without a will," &c., &c.

The court is referred to the facts in that case. I also cite it as showing a rule of construction governing courts in cases like that at bar:

*Mace vs. Churchman*, 45 Maine, 250. This was a case under a statute of Maine which provided that the real estate of married women who die intestate shall descend or be distributed to her heirs. The court refused to give it such a construction as would deprive the surviving husband of the rights which he would have enjoyed under a previous law. I refer the court to the argument of counsel for appellant, no less than the opinion of the Judges in that case.

"Homestead," as defined by Abbott, (Law Dic., 567) 'in a general sense designates the land and dwelling appropriate



---

---

Brokaw v. McDougall et als.—Argument of Counsel.

---

---

ated as the permanent residence of a family.” Then for a homestead there must be a family. But if the widow had no homestead rights, here is a dwelling and land appropriated and consecrated as a permanent residence of a family, from which the surviving head of the family, the mother of the children, is excluded.

II. There was not sufficient grounds upon which the court below set aside the action of the commissioners in assigning Mrs. Brokaw’s dower. From the character of the commission merely as *commissioners* there is the highest possible presumption in favor of the justice of their action.

Against their action, and the character which the law imparts to them, we have what? The affidavit (*ex parte*, of course,) of two persons of whom and of whose capacity, looking into this record and adjudging from its disclosures, the court can know nothing, and can infer nothing. There is simply the opinion of two men, of whom the court knows nothing, because the record discloses nothing against the solemn, deliberate and unanimous action of a sworn commission consisting of five gentlemen. *Lenox vs. Livingston*, 47 Mo., 256; 19 Texas, 567; 2 Dan. Chy., 1130; *Jones vs. Totty*, 1 Sim., 130; 1 M. & K., 330.

As to the somewhat singular, not to say absurd, proposition made by complainants for a *swap* of lands, it seems hardly worthy of notice; and really to be nothing more than trifling; as if a guardian *ad litem* could in this manner trade off lands accorded to a minor! But taking it seriously; the answer to it and the objection to it, on the part of the widow, is that it proposes to deprive her of her house and home; the dwelling in which her husband and herself resided at the time of his death; the occupation and enjoyment of which is guaranteed to her by the laws of Florida for the term of her natural life. Thompson’s

---

 Brokaw v. McDougall et als.—Argument of Counsel.
 

---

The proposition that a widow who is but a life tenant should surrender the dwelling for unimproved land, however valuable yet of no use to her, is on its face an absurdity.

By reference to the report of the commissioners it will be seen that they set off to Mrs. Brokaw ten acres of land (including the dwelling-house); to one of the daughters, 65 acres and also a city lot; to the others, 65 acres and a fraction. By express words in Magna Charta it is provided in favor of the widow, that "for her dower shall be assigned unto her the third part of all the lands of her husband which were his during coverture."

In my opinion the Commissioners did the widow less than justice. The property is surely not city property. Unless under special circumstances, which the record does not show to exist in this case, the widow is entitled to "the whole of the dwelling house, out houses, buildings and other improvements thereunto appertaining." And under the decisions of the Supreme Court of Tennessee, from which State our statutes on the subject would seem to have been taken, in setting off to the "widow" one-third part according to quality and quantity, the value of the dwelling house is not to be taken into consideration in fixing values. *Vincent vs. Vincent*, 1 Hask., 333.

As we have seen by Magna Charta the widow was dowered by one-third part of the lands of her husband. As says Washburn, 1 Real Property, 175, "So uniform has been the common law of both countries been in this respect that in popular phrases a widow's dower is called her third."

And now comes in our statute which affirms Magna Charta, as to the widow's one-third adding, however, that which said third shall be comprehended the dwelling house in which her husband shall have been accustomed most generally to dwell." Section 1, Acts of 1828. A

---

---

Brokaw v. McDougall et als.—Argument of Counsel.

---

---

when it is said in Section 5 of the same act, Thomp. Dig., 186, that commissioners in assigning her dower “shall allot and set off by metes and bounds one-third part according to quantity and quality,” I don’t think there is or can be much difficulty in discovering the meaning of the clause, though practically there may sometimes be trouble in executing it.

If it was designed to claim for the children the benefit of the proviso for cases of “manifest injustice,” it was necessary that there should be proofs in the record of the “injustice” for which that clause is intended to provide. There is no such proof, and no facts on which to base such a conclusion; the action of the commissioners negatives their existence; and the court cannot assume what the evidence does not show.

*John A. Henderson* for Appellees.

1. The judgment of the court denying her homestead as well as dower estate in the said lands.

2. The decree of the court setting aside said report of commissioners.

For the appellees, it is contended that there was no error: and for authority, submits on the first ground, that the decision of the Chancellor was strictly within the case in this court of Wilson, Executrix, *et al.*, vs. Fridenburg, decided June term, 1882.

On second ground, that the commissioners were correctly directed by the court, in the allotment of dower and the distribution of estate. Acts of 1828, §3, as amended by Chap. 1447; Acts of 1864, Laws of Florida, McC. Dig., 477, §7.

The widow was not entitled for dower under Sections 1 and 2, Acts of 1828, to the dwelling house, &c., because it

---

---

Brokaw v. McDougall et als.—Opinion of Court.

---

---

was manifest that the share allotted to her could not be applied without injustice to the appellees, and came clearly within that exception. See Acts of 1828, and 1864, McC. Dig., pp. 475-6-7, and affidavits of Hawkins and Lewis.

The commissioner's report should have been set aside, because they did not observe the law but disregarded same and gave to the widow more than one-third in quantity and quality, &c. See offer of appellees to give 1 for hers or two for one and pay bonus; see also affidavits of George Lewis and A. B. Hawkins.

In making the assignment of dower, the estimate of third part has reference to the productive value and not quantity. Such part of the estate should be given to her as will be one-third part of the annual income or product and no more. 1 Williams on Real Prop., 4th Ed., 2 Coats vs. Cheever, 1 Cow., 476; McDaniel vs. McDaniel, 61 Ired., 61; Smith vs. Smith, 5 Dana, 179; Leonard vs. Leonard, 4 Mass., 533.

Complainants were entitled to notice of time and place of meeting of commissioners and should have been allowed to introduce testimony as to the values before the commissioners. See Decree of Allotment, &c., McC. Dig., p. 477, §8.

Objections to the confirmation of the report were properly made. McC. Dig., p. 478, §13; Williams on Real Prop., 4th Ed., 288; Chapman vs. Scholder, 10 Ga., 321.

THE CHIEF-JUSTICE delivered the opinion of the court.

The first ground of alleged error in the decree is the overruling of defendant's demurrer "to so much of complainant's bill as prays that she may be required to elect to take either her dower or a homestead in the real estate mentioned," the cause of demurrer being that complainants have not stated a case entitling them to such relief.

---

---

Brokaw v. McDougall et als.—Opinion of Court.

---

---

There are other prayers in the bill, the principal one being for a partition, and as to that the bill states a proper case for relief. A demurrer must be grounded upon a "short point" upon which it is clear the bill would be dismissed at the hearing. *Brooke vs. Hewitt*, 3 Ves. Jr., 253; *Verplanck vs. Caines*, 1 John's Ch., 57; *Earl of Suffolk vs. Green*, 1 Atk., 450; *Story's Eq. Pl.*, §§526, 528.

*Verplanck vs. Caines*, presenting this identical question, says: "A demurrer must be founded upon some certain and absolute proposition, destructive to the relief sought for." The result is that a demurrer is not allowed to an alternative prayer, if any other relief prayed may be granted. We find no error in overruling the demurrer.

The second alleged ground of error is the decree of the Chancellor that defendant "as widow was not entitled to a homestead estate in the lands and tenements mentioned in the bill."

It was decided by this court in *Wilson vs. Fridenburg*, 19 Fla., 461, that the exemption of the homestead provided for in the Constitution of this State, Art. IX, is exemption from forced sale for the debts of the owner who is the head of a family residing in this State; and that this exemption of the homestead from such sale is all that enures to the heirs of the owner upon his decease.

It was also held that the language of the article, the homestead "shall not be alienable without the joint consent of husband and wife, when that relation exists," operated to prevent any alienation or other testamentary disposition of the homestead by such head of the family who may die leaving a widow and children.

It was further held that this exemption of the homestead from liability to pay debts and prohibiting such alienation, so extended in behalf of the heirs, did not confer any new

---

---

**Brokaw v. McDougall et als.—Opinion of Court.**

---

---

right of property or tenure upon the widow, in the homestead, either as to the heirs or as to the creditors.

That without this exemption clause the heirs were not protected from creditors while the widow was protected by law in her right of dower; while under this homestead exemption the heirs are protected and no right is taken away from the widow, her right of dower under the general law being unaffected by the constitutional clauses referred to.

The rights of the widow and children are therefore not controlled or qualified by the provisions of the will so far as the homestead property is concerned, and in that respect the title descends, according to the law regulating descent to the heirs, subject to the dower rights of the widow, though no will had been made.

Respondent here, referring to the ruling of this court in *Wilson vs. Fridenburg*, very properly asks that the decision in that case, as respects the status of the widow, be reconsidered. With appropriate deference to the conflicting opinions of members of the bar upon the question we have again examined the question, but with the lights before us we are unable to reach a different conclusion in regard to the rights of the widow.

The remaining ground upon which it is claimed that the decree of 28th September, 1882, should be reversed is, that erroneously set aside and quashed the report of the commissioners, allotting and assigning dower to the defendant.

The report of the commissioners assigned to the widow the lot numbered one in the plat accompanying the report "containing ten acres, more or less, and on which is situated the dwelling-house, out-houses and improvements, occupied by the said P. B. Brokaw, last before his death."

It assigns to Eliza Brokaw, one of the two surviving heirs, lot No. two, containing fifty-three acres and a fra

---

**Brokaw v. McDougall et al.—Opinion of Court.**

---

tion, and lot thirteen in the north addition to Tallahassee; and to Phæbe McDougall, the other surviving heir, lot No. three, containing sixty-five acres and a fraction.

The complainants not being satisfied with the allotment excepted to the report on the ground—*First*, That in the description of the portion allotted to Eliza Brokaw an error occurs, which locates a large portion of the 53 acres outside of the quarter section intended to be partitioned and within the city of Tallahassee.

*Second*. That the commissioners failed to notify complainants or their solicitor of the time and place of taking testimony as to the value of the lands and improvements.

*Third*. That they omitted to report to the court the testimony upon which they based their judgments of the values of the several portions, for the information of the court.

*Fourth*. That there is no equality in the value of the portions allotted, the share allotted to the defendant being of greater value than both the shares allotted to the complainants, wherefore the complainants say the report should be set aside and the matter recommitted with further directions, &c.

In support of the fourth exception they filed the affidavits of two citizens who each say they are acquainted with the premises and the improvements thereon, and have examined the map of the sub-divisions as reported by the commissioners, and they consider the value of lot one allotted to the defendant at six thousand dollars, the value of lot two set off to one of the complainants at five hundred and thirty dollars, and the value of lot three set off to the other complainant at six hundred and fifty dollars.

Upon these exceptions and affidavits the court made an order setting aside the report of the commissioners, and directed them to proceed to execute the order appointing them according to its terms.

---

---

**Brokaw v. McDougall et als.—Opinion of Court.**

---

---

The report of the commissioners placed no valuation upon the whole tract or any portion of it, nor do they report the testimony taken by them or other evidence before them upon which they came to their conclusion, nor does it appear that they took any sworn testimony unless it may be inferred from their statement "that in considering qualities and values of the several lots of property they have made the basis of their action the prices and values, so far as they could learn, realized in the sale and transfer of real estate in the city of Tallahassee and its immediate vicinity for a year or more last past, and that to the best of their skill, knowledge and judgment the foregoing division of the premises is equal, equitable and fair, and that the several lots bear a like relation as regards quantity and quality or value."

As to the first ground of exception, the error in misdescribing the lot two set off to Eliza Brokaw, and including lands not embraced in the proceedings, a mistake was evidently made by the commissioners, and the court should have set the report aside for this, if for no other reason, in order that a correct report and allotment might be made. This was doubtless one of the reasons influencing the court in recommitting the matter to them.

The real question of importance under the exceptions whether the court was justified in quashing the report on account of the alleged inequality in the quantity and quality of the several portions allotted whereby "manifest injustice" was done to the heirs.

The position of the appellant is as stated in the argument that there were not sufficient grounds appearing in the case below upon which the report should have been set aside and that "from the character of the commission, meretricious as commissioners, there is the highest possible presumption in favor of the justice of their action." Con-



---

**Brokaw v. McDougall et als.—Opinion of Court.**

---

sel cites in support of the finality of the judgment of the commissioners, the cases of *Manners vs. Charlesworth*, 1 Mylne and Keen, 330, and *Jones vs. Totty*, 1 Simons, 136. These cases were decided upon exceptions to a return of commissioners in partition and in both it was held that the report could not, under the law and practice in England at the time, be set aside upon the ground of inequality in the allotment, and that no "instance could be found of interference with the action of the commissioners where the regularity of their proceedings was not impeached." It was said that "considering that the three commissioners here were named by the three different parties and were, therefore, judges of their own choice, the principles which applied to arbitrators were properly applicable to them; and for that reason, he should have hesitated to suppress the return, even if he had been satisfied that the commissioners had erred in their judgment as to value." *Jones vs. Totty*.

In Tennessee, *Vincent vs. Vincent*, 1 Heisk., 333, cited by appellant, it is held that "the statute does not contemplate a valuation of the improvements, and that such of them as are allotted to the widow shall be set off against an equal value in land. The direction is explicit, that such part or portion only of the dwelling house, outhouses, &c., as can be applied to her use, without manifest injustice to the children, shall be allotted to her." *Ib.*, 339.

In that case the report gave the widow the buildings, including the mansion house, but did not give her one-third in value of the land. *The report was set aside* on her motion, upon testimony showing the facts. From this construction of the Tennessee statute, and from examination of the statute itself, it is manifest that it differs from the statute of Florida.

In *Lenox vs. Livingston*, 47 Mo., 255, cited also by ap-

---

---

Brokaw v. McDougall et als.—Opinion of Court.

---

---

pellant, exceptions were taken to the report of commissioners, not allege fraud, partiality or misconduct, but that it was prejudicial to the interests of the appellant. The court says: "The commissioners were the proper persons to determine as to what part of the land should be assigned, and in the absence of testimony showing that they abused their discretion, their action cannot be interfered with. The appellant rested his whole case upon his simple allegations. He did not introduce or offer to introduce any evidence whatever in support of his charges. No court would have been justified in setting aside an official report made by men in the performance of an official duty, and acting under the sanction of an oath, on the unsustained assertions of an interested party."

The only other authority cited by appellant is *Jewett vs. Scott et al.*, 19 Texas, 557. This was a case of partition of land, in which the appellant excepted to the division as unequal and unjust, in that the lands assigned to one greatly exceeded in value those allotted to the other. There were six commissioners and they reported that the portions allotted to each were "equal in quantity and quality," and gave their reasons for making the division in the mode pursued. *Four* witnesses testified that the lands allotted to appellant were of considerable less value than the lands allotted to the other party. Three of the commissioners testified in support of their action, showing their diligence and good intentions. Says the court: "They were selected for their ability and integrity. The law presumes that they acted with zeal, skill and fidelity in their trusts, and their act cannot be impeached unless for fraud, partiality or gross mistake in their judgment. There is no pretence or charge of fraud, and the question is whether there is such a mistake in their decision as to operate injustice to the appellant. Upon a review of the facts the mind is

---

---

Brokaw v. McDougall et als.—Opinion of Court.

---

---

forcibly impressed with the conviction, that there must be error and wrong in the proceeding. The commissioners acted from inspection on their own judgment exclusively, and no doubt they acted honestly. But no witness is called who concurs in their estimates of the value of the several allotments. All the witnesses are of opinion that the allotments were very unequal in value and greatly to the disadvantage of the appellant. The question of inequality was the matter in issue, and unless the report of the commissioners is conclusive, it seems that the *prima facie* presumption of its justice was rebutted by the force of the evidence; and it should have been supported by witnesses who would have concurred, to some extent at least, with the judgment of the commisisoners. The report was set aside.

By our statutes the widow is endowed of one-third part for life in the lands, tenements and hereditaments of which her husband died seised, &c., and in that third “shall be comprehended the dwelling house in which her husband shall have been accustomed most generally to dwell next before his death, together with the offices, out houses, buildings and other improvements thereunto belonging or appertaining”: *Provided*, “That if the whole of the said dwelling house, out houses, buildings and other improvements thereunto appertaining, cannot be applied to the use of the widow without manifest injustice to the children or other heirs, then and in that case such widow shall be entitled to such part, not less than one-third part, as the court may deem reasonable and just.”

The complainants on excepting to the report of the commissioners filed the affidavits before referred to in support of the exception that there is no equality of value between the part assigned to appellant and that allotted to the children. These affidavits were considered by the court with-

---

---

Brokaw v. McDougall et als.—Opinion of Court.

---

---

out objection, so far as the record shows, and no counter affidavits in support of the report were filed or offered. The commissioners make no estimate of the value of either portion but say in general terms that the division is "equal, equitable and fair." The court heard the exceptions and the motion to quash the return upon the report, "the exceptions thereto and the accompanying affidavits, and the respective solicitors having been heard," &c.

And it appeared by the affidavits that the part allotted to the widow was in value more than five times greater than that of both parts assigned to the children. There is nothing in the report showing that these several estimates of value are incorrect. The respective parties went to a hearing upon this state of facts duly sworn to and contradicted.

The statute gives to the widow the use of one-third of the "lands, tenements and hereditaments;" not of the lands alone, but of the lands, structure and uses.

In estimating "quantity and quality" for the purposes of equality of division, where lands and improvements are being dealt with, the *value* of the several portions of the property must necessarily be considered, and this value must be determined by the money value in the market, its productive value, and the incomes or rents and profits it will produce. An equal division of the lands, giving to each party her share by metes and bounds, which would give to one of them the portion having all the houses and improvements, worth in market or in productiveness ten times as much as either of the other shares, must be manifestly unjust to the other heirs. While the law deals with appropriate liberality in giving to the widow the mansion house and other improvements, yet it provides that where this may operate with manifest injustice to the children or other heirs the widow shall be entitled to such part, not

---

**Brokaw v. McDougall et als.—Opinion of Court.**

---

less than one-third part, of the lands, tenements and hereditaments, "as the court may deem reasonable and just." This contemplates not alone the division of the lands, but the division of the entire property including improvements in such manner that no injustice shall result to the children. They, as well as the widow, are entitled to consideration. When the law says the widow shall be endowed of one-third, it means one-third as near as practicable in quantity and quality, but it does not mean six-sevenths in quantity and quality.

While the commissioners in their return say that this division was "equal, equitable and fair," they do not show to the court that they have given to each party one-third in quantity or quality of the property, nor is it shown in any manner as against the depositions that such was the result of the division. They may have assumed, and perhaps did assume that the widow was entitled not only to the one-third but also to a "homestead" in addition to the one-third. Such is the claim made by her in her answer and in the argument here, and this may have been the view of the commissioners. From what we have said it is clear that this proposition cannot be supported.

It is said by the court in the case of Vincent vs. Vincent, above referred to, that "if it appear to the court assigning the dower that the whole of the said dwelling-house, out-houses, offices and appurtenances cannot be applied to her use without manifest injustice to the children or other relations, then such part or portion thereof as the court shall conceive will be sufficient to afford her a decent residence, due regard to her condition and past manner of life, shall be assigned to her."

One ground of exception to the report is that the complainants had no notice of the time and place of taking testimony as to the value of the lands and improvements; and

---

---

Brokaw v. McDougall et al.—Opinion of Court.

---

---

further, that such testimony was not reported to the court for its information.

In the examination of witnesses, the proceedings of the commissioners should be open and not secret, as “they act in a judicial capacity, in the nature of a court, at which the parties and their agents have a right to be present.” 2 Dan. Ch. Pr., 1154. And in Cecil vs. Dorsey, 1 Md. Ch. R., 227, the Chancellor says: “It seems to me to be quite apparent that the revising power of this court cannot be wisely exercised, and the return ratified or rejected, as justice shall dictate, unless the value of the whole estate, and the value of the several parts, as ascertained by the commissioners, is reported. The great object to be attained is a partition among the parties interested, fairly and equally in value according to their several just proportions, and I cannot understand how the court can see that this is done, if the commisioners may or may not show by their return the value they have put upon the entire estate and of each part thereof.”

In the present case it does not appear by the report whether witnesses were or were not sworn and examined. The commisioners say that in considering qualities and values of the several lots “they have made the basis of their action the prices and values, so far as they could learn, realized in the sale and transfer of real estate in the City of Tallahassee and its immediate vicinity for a year or more last past.”

They still do not report what those values were of the several parts allotted, so that the court could determine, its revising power, that the allotment is properly made.

According to the report they had information of the values of property in Tallahassee and its vicinity, as realized in the sale and transfer of real estate, for a year or more last past. If this information was obtained from the tes—

---

Stribling et ux. v. Hart Executrix, et als.—Syllabus.

---

mony of witnesses, such testimony should have been duly taken and reported to the court for its consideration. If the information was obtained by irresponsible statements, not on oath, made to the commisisoners or some of them, it was not such testimony as should be relied upon in adjudicating the rights of the parties.

We do not discover that the Chancellor abused the discretion confined in him by the statute, in setting aside the return of the commissioners. The several decrees appealed from are affirmed.

---

THOMAS E. STRIBLING ET UX., APPELLANTS, VS. CATHERINE S. HART, EXECUTRIX, ET ALS., APPELLEES.

1. The 45th Rule of Chancery Practice prescribes the time in which an answer after appearance should be filed by the defendant, and the 51st Rule prescribes the time in which the defendant, after his demurrer to plaintiff's bill is overruled, shall file his answer. In neither case is the plaintiff required by these rules or the general rule upon the subject of notice (Rule 3) to take any action to authorize him to enter an order that the bill be taken *pro confesso* in the event the answer is not filed as required by the rules mentioned.
2. After entry of the order that the bill be taken *pro confesso*, the plaintiff may at once, and without notice, cause the matter of the bill to be decreed at any time, if the same can be done without an answer and is proper to be decreed, that is to say, he can have such decree as the equities disclosed by his bill authorize.
3. When the bill is thus taken *pro confesso* and final decree had. It is, under Rule 45, a decree *nisi*, subject to be opened upon cause shown upon motion and affidavit and upon terms, and does not become "absolute" until the expiration of twenty days after the rendition thereof. After the expiration of this time, without any action by the defendant, the decree becomes final and "absolute." There is no difference arising out of the fact that under

---

Stribling et ux. v. Hart, Executrix, et als.—Argument of Counsel.

---

the statute this final decree is entered out of term between it and a decree entered in term; and the proceeding is in a strict sense a record by which the rights of the parties in controversy are finally adjudicated.

4. While it appears that the Circuit Courts of the United States have not power to open such decrees absolute and enrolled, upon motion, and that their power is confined to such proceedings as may be had by bill of review, rehearing or original bill, still under the uniform practice in the State courts such a power is admitted to exist, and may be exercised under certain circumstances, and as a motion is the only means by which the decree may be opened, and a defence upon the merits let in, although the party may be guilty of no laches, and his failure to set up his rights in the time required may be occasioned *by causes beyond his control, and by obstacles insuperable in their character, and he may have a good defence*, we think the rule of the State court as to the matter of power is the better rule; and we adopt it.
5. The power to open such decree, however, is not to be exercised in cases where the decree has been made absolute in the regular course, and the defendant has been guilty of neglect and failure to give attention to the process of the court. Without the existence of strong and unavoidable circumstances excusing such neglect and laches, the decree should not be opened. Such power should not be exercised upon a mere desire to let in a defence upon the merits. The facts established must show deceit, surprise or irregularity in obtaining the decree, that the defendant has acted *bona fide*, and with reasonable diligence, and has a meritorious defence, and the facts constituting such defence must distinctly and satisfactorily appear, and the proposed answer should be exhibited.
6. The action of the Chancellor upon a motion of the character mentioned may be reviewed in his court under the law and practice in this State.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

*William B. Younge and John Earl Hartridge* for Appellants.

There can be no opening of a decree on motion after it



---

Stribling et ux. v. Hart, Executrix, et als.—Argument of Counsel.

---

has been enrolled. 2 Daniel's Ch. Plead. and Prac., 1018 *et seq.*; 60 Ala., 378; 12 Peters, 492; 2 Johnson's Ch., 205; 1 Vesey, 256, note; 3 Wheaton, 591; 6 Howard, 593; Pickett vs. Loggon, 5 Vesey, Jr., 702; 16 Vesey, Jr., 115; 5 Allen, 81.

In this State all decrees are deemed to be enrolled when entered on the minutes of the court. McC. Dig., page 165, §44; Owens vs. Forbes, Adm'r, 9 Fla., 325. The statute authorizes a rehearing, provided a petition be presented within thirty days.

Rule 45 which has the force and effect of a statute, declares that when the bill is taken *pro confesso* the court may render a decree at any time, and such a decree so rendered shall be *absolute*, unless the court shall within twenty days after rendering the decree set aside the same on motion and affidavit. In this case more than twenty days had passed after the rendition and enrollment of the decree before any motion was made, and the court had no power to disturb the decree. If the court should vacate its decree after the expiration of the twenty days then there is no limit to the exercise of this power and another judge, many years after, might do the same thing, and decrees in chancery instead of settling the rights of all parties would settle nothing, and the word absolute in Rule 45 has no force and effect. We do not deny that upon a proper application and proof of such fraud and mistake as would warrant the court in enjoining a judgment at law, the court can annul its own decrees, but there must have been no laches, and the affidavits filed in support of this motion only show laches.

Even if the court had the power the facts did not warrant its exercise.

*Fleming & Daniel* for Appellees.

---

Stribling et ux. v. Hart, Executrix, et als.—Argument of Counsel.

---

We contend that the court did not err in opening the decree *pro confesso*, but in doing so exercised a proper discretion.

If any irregularity has occurred in the enrollment of decree or order, or in the proceedings to accomplish the object the court will, upon application by motion, order to be vacated. 2 Daniel Ch. Pr., 5th Ed., §1026.

It seems also that where the case has not been heard upon its merits, the court will exercise a discretionary power of vacating an enrollment and of giving the party an opportunity of having the merits of his case discussed. 2 Daniel Ch. Pr., §1027.

Thus the enrollment was vacated where a decree of dismissal was made by default, owing to the neglect of the plaintiff's solicitor to provide counsel to attend at the hearing. Robinson vs. Cranwell, 1 Dickens, 61, (Eng. Chanc. 2 Eliz., 38 Geo. 3d,) cited in 1 Ves., Sr., 205; Trapp vs. Vincent, 8, page 176; Parker vs. Grant, 1 Johns. Ch., 630.

The same principle was also acted upon by Lord Hardwicke in Kemp vs. Squire, 1 Vesey Sr., 205, who said the case he cited proved it to be discretionary in the court, (he did not mean it arbitrarily so,) to exercise the power, if it seemed fit. \* \* \* And it is to be observed that in all those cases where it has been exercised the merits of the cause had not been discussed before the decree was pronounced. 2 Dan. Ch., Pr., 1027.

The court has power at its discretion, after enrollment to vacate a decree entered *pro confesso* to allow a defense upon the merits when it has been omitted through mistake or accident or even negligence. Carpenter vs. Muchmore, McCarter, N. J., 123; Hall vs. Lamb, 28 Vt., 85; Disbrow vs. Johnson, 3d C. E. Green, 36; 2 Daniel Ch. Pr., 5th Ed. 1032, note 6.

But in order to open a decree regularly entered it is ■

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

cessary that it appear that the defendant has some good defence, and what that defence is. *Disbrow vs. Johnson, supra.*

The application is addressed to the discretion of the court. *Bull vs. Nims*, 51 Ill., 171. And must be accompanied by affidavit explaining the delay and an answer showing merits. *Norton vs. Hixon*, 25 Ill., 440; *Stockton vs. Williams*, *Harrington Ch., Mich.*, 241; *Gwin vs. Harris*, 1 Sm. & M. Ch., Miss., 528; *Lewis vs. Simonton*, 8 Humphrey, Tenn., 185.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The bill here is by Stribling and wife against the executrix of the will of O. B. Hart and others, his sureties, as guardian of Mary E. Stribling, seeking an account and decree against such executrix and sureties for an alleged balance due her.

Appearances were entered by the defendants, Baldwin, Budington, Paran Moody and C. L. Robinson on or before the first day of November, 1880.

On the first of November, 1880, a demurrer was filed for these defendants, the ground of which was a want of jurisdiction in the Circuit Court. It was overruled the 25th of May, 1881. The rule day, therefore, to which an answer was due by them was the first Monday in June, the 6th day of June, as the court did not extend the time beyond that date. Upon overruling a demurrer of the defendant, he is required to answer by the next succeeding rule day unless further time is given by the Chancellor.

On the 16th day of September, 1881, Messrs. Fleming & Daniel entered an appearance for Marvin, Administrator, and on the 3d day of October, 1881, which was the rule

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

day of that month, Mrs. Catherine Hart, executrix of the will of O. B. Hart, entered her appearance. It is thus seen that the defendants, Baldwin, Budington, Moody and Robinson, on the rule day of November, 1881, the 7th, were in default for not filing their answer, from the sixth day of June to the 7th of November, a period of five months; that Marvin, administrator, was in default, according to the date of the entry of his appearance, one month, his answer being due by the rule day of October, and that Mrs. Hart who had appeared upon the October rule day was in default in not filing her answer on the November rule day. On that day an order taking the bill for confessed, was entered against all of the defendants. Under Rule 44 of the Rules of the Circuit Courts, in suits in equity, which authorizes this entry and declares its effect, the subsequent proceedings are *ex-parte*. The plaintiffs might thus have proceeded under the rule at once, and had an order of reference and consequent decree thereon immediately. This decree, however, was not made until the ninth day of February, 1882. In the meantime, the plaintiffs on the 22 November, 1881, consent that the order taking the bill for confessed, as to Budington, may be opened upon condition that he file his answer at once. This he does. There are exceptions sustained to his answer and upon their being sustained he is given to February rule day to file a more complete answer. This he fails to do, and after entering an order taking the bill as confessed against him the plaintiffs have a decree of reference to a master, a report and decree thereon on the 11th of March, 1882. Under this decree, and on the 10th day of April, 1882, an execution was issued against Catherine Hart, executrix of the will of O. B. Hart, and on the 17th of April, 1882, a return of no property found is made. Under the decree an execution was in this event directed to issue against the sureties to the extent of

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

their liabilities as found by the court. We do not find that such an execution was issued. It is not denied that the decree has been enrolled.

After notice given of intended motion to set aside the final decree and the order taking the bill as confessed and for leave to file answers by Fleming & Daniel, as solicitors for A. S. Baldwin, Marvin, administrator, and Mrs. Hart, executrix, and by D. C. Dawkins and Fleming & Daniel, solicitors for Budington, the Chancellor on the third of May, 1882, granted the order and gave the defendants fifteen days in which to answer the bill.

The appeal herein embraces this order, and the first question to be determined is whether a decree of this character can and ought to be opened on motion and affidavits under the circumstances of this case.

What is the nature of the decree? It is a final decree under the 45th rule of practice rendered absolute in its nature by failure of the defendants upon cause shown upon motion and affidavit within twenty days after its rendition to have it set aside or to have the time enlarged for filing the answer; such decree being based upon a default for want of an answer after appearance. Before the expiration of the twenty days, while it is in form final, it is in effect, under the rule, a decree *nisi*. After the expiration of the twenty days it is both in form and effect *final* and *absolute* under the rule. Such a decree is as effective and absolute as if rendered in term and the term of its rendition had expired. We mean by this that there is no difference arising out of the fact that under the statute it is entered out of term. It is, so far as this matter is concerned, in a strict sense a record by which the rights of the parties in controversy are finally adjudged. In *Thompson vs. Goulding*, 5 Allen, 81, this question is considered, and there can, in our judgment, be no doubt of the correctness of the conclusion

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

there reached, which is that a decree entered out of the term under the provisions of a statute like that of this State is as final as those entered in term. But it is said this is a decree *pro confesso*; a decree final based upon a default, and it is within the power of the Chancellor to open such a decree upon motion. This is true of the nature of the decree except that there are two defaults, one a failure after appearance to answer in the first place, and one a failure to move to open the decree within twenty days after its rendition. It is practically a decree *nisi* until this time expires. Then the rules fixes its character. It is "absolute" as well under the statute as the rule. Can such a decree be set aside upon motion after the expiration of the twenty days without a motion so to do during that time.

The rules of the Circuit Courts of the United States in force in 1855 provided that "when the bill is taken *pro confesso* the court may proceed to a decree at the next ensuing term thereof and such decree rendered shall be deemed absolute unless the court shall at the same term set aside the same or enlarge the time for filing the answer upon cause shown upon motion and affidavit of the defendant," &c.

In the case of McMicken vs. Perin, 18 How., (U. S.) 507, which was the case of a decree *pro confesso* which had become absolute under the rule, McMicken at a subsequent term of the Circuit Court filed a petition "alleging that he had been deceived by Perin in reference to the prosecution of the bill and had consequently failed to make any appearance or answer, and that he had a meritorious defence and prayed the court to set aside the decree and to allow him to file an answer to the bill." The Circuit Court dismissed the petition. The Supreme Court of the United States citing Cameron vs. McRoberts, 3 Wheat., 591, hold that the Circuit Court had "*no power*" to set aside the decree on motion after the term at which it was rendered.

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

By reference to the case in 3 Wheat. it will be seen that it was a decree after appearance and answer. This case being cited by the Supreme Court of the United States in the 18th Howard case a decree *pro confesso* made absolute under the rule, shows that this court regarded a decree thus become "absolute" under the rules of the Circuit Court as to the power of the court, in the same condition as a final decree upon appearance and answer after the term at which it was rendered. We see no escape, therefore, from the conclusion, if the rule announced by the Supreme Court of the United States is to prevail, that the Chancellor had no power to open this decree by motion and affidavits and that there was error in this action here. What the defendants in decree here seek is leave to answer and a hearing upon the merits. If there is any other proceeding in equity but a motion based upon petition and affidavits with an exhibit of the answer, by which such an end can be accomplished, we are not aware of it. After final decree enrolled it may be assailed by original bill for fraud. If there is error in law arising upon the pleadings, proceedings or decrees, then a bill of review without leave will lie, or if there is discovery of material new matter of fact such as the party by the use of reasonable diligence could not have known then a bill of review with leave of the court will lie, or if there is a clerical mistake in a decree or an error arising from any accidental slip or omission the party may by petition have it corrected if his application be before an actual entry of the decree. Rule 87, Chancery Rules. These are the only remedies, and neither can be made available to accomplish the end here sought to be obtained, viz: the opening of the final decree and letting in a defence upon the merits. The consequence of this is, that the cause of the default, unless it be fraud, can never be the subject of inquiry after the final decree entered, although the party may be guilty of

---

*Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.*

---

no laches, and his failure to set up his rights and urge defence as fixed by the letter of the rule in the time required may be occasioned by causes beyond his control : by obstacles insuperable in their character and he may have at the same time a good defence to the claim made or a clear right to the subject matter of the controversy. Again, upon appeal, he can only question the legality of the proceedings anterior to his default or urge that the decree is not such as is warranted by the bill. This is a matter of practice controlled by the rules, and a matter of practice subject to regulation and control by a court is not such an absolute and unchangeable character as the principle of law controlling general subjects of judicial action, such as rights resulting from contract and rights of property. The Supreme Court of the United States, in reaching this conclusion, did it by its simple announcement and by reference to a ruling in the case of a final decree rendered in a case where "all the defendants appeared and answered," a case where one of them (Cameron) had filed a bill of review which was then pending, and as to whom, the court said if he had a distinct interest, so that substantial justice could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone. Thus intimating that the remedy as to other defendants, if the proceedings were assailable for a want of jurisdiction as to them, was by bill of review. The other citation, *Brockett vs. Brocket*, 2 How., 238, is to the effect that an appeal will not lie from action in a matter which "rests merely in the sound discretion of the court below." If the granting of the motion by the Circuit Court in the case of *McMicken vs. Perin*, to open the decree, was a matter resting merely in the discretion of that court, the case in 2 Howard was in point, and the ruling was not the subject of an appeal. This rule, however, does not prevail



---

*Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.*

---

this State. See upon this subject *Oliver vs. Palmer & Hamilton*, a well considered case, reported in 11 Gill & Johnson, 147: 4 Brown Par. Cases, 456. Thus stating the rule announced by the Supreme Court of the United States, we inquire what is the rule in States having like rules to this State upon the subject of decrees based upon defaults of defendants.

In the State of Maryland, the matter of the entry of such decrees is controlled by a statute authorizing a final decree upon default. Maryland Code of 1878, 637. In that State there has been a separate organization of the Court of Chancery since 1777, and its action in such matters is entitled to great respect and consideration. The first case we find upon the subject is *Burch vs. Scott*, 1 Bland Chy. Reports, 112. In that case there was a decree by default for more than was due, and there were other circumstances explaining the neglect to put in an answer for the space of five months. The defendant filed a bill of peculiar character partaking of the nature of an original bill and of a bill of review, and as stated by the Chancellor, "a bill grounded on the peculiar circumstances." The Chancellor held that he could not have the relief asked which was to set aside the default and to have a hearing upon the merits upon original bill or bill of review, but he did, in view of the hardship of the case, as he regarded it, grant the relief upon it as "a bill grounded on the peculiar circumstances." Upon appeal this decree was reversed upon the ground that the remedy was not upon a bill of this character, and that the circumstances of the case did not justify the opening of the decree. The power, however, to be exercised in a proper case was admitted to exist. This decision of the Court of Appeals of Maryland was affirmed afterwards in opinions showing great research and ability in *Oliver vs. Palmer & Hamilton*, 11 Gill & John-

---

*Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.*

---

son, 147; Herbert vs. Rowles, 30 Md., 280; Pfeltz vs. Pfeltz, 1 Md. Chy., 455; and in a case decided in 1880, Rust vs. Lynch & Jackson, 54 Md., 636. In this case the rule is stated to be:

“1st. That in a proper case there is no question but that a defendant would be relieved from a decree obtained by default, and when the merits had not been discussed upon petition for the discharge of the enrollment and the vacation of the decree.

“2d. The discretion to be exercised upon such application must be regulated by law and precedent, and not a mere desire to let in a defence upon the merits.”

The statute of New Jersey authorizes a final decree to be entered upon such defaults. The rule in that State is stated thus: “It has long been settled that an enrollment will be vacated and a decree opened when the decree has been made unjustly against a right or interest that has not been heard or protected when this has been done without the laches or fault of the party who applies.” *Brinkerhoff vs. Franklin*, 21 N. J., Eq., 336.

The Court of Chancery of Michigan which had a separate organization in 1842, announced the rule to be that “after a decree has been entered on a bill regularly taken as confessed the question of opening it to let in a defence on the merits should be brought before the court by petition accompanied by the answer proposed to be put in.” *Hart vs. Lindsay*, *Walker’s Chy. Reports*, 74.

The “Supreme Court of Appeals” of Virginia in *Erwin vs. Vint*, 6 Mun., 270, sustain the power of the court of original jurisdiction to open the decree upon cause shown.

We deem it unnecessary to make any further extracts from reports of other States covering the question of power. The following citations show that a like rule prevails in the States mentioned: Vermont, *Hall & Bingham vs. Lamb*,

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

28 Vermont, 85; Massachusetts, Thompson vs. Goulding et al., 5 Allen, 82.

This subject is, to some extent, controlled by statutes in New York, Barb. Chy. Prac., 371, but the result of the cases is unquestionably in favor of the power. Under the statutes of New York the practice was subject to the control of the Court of Chancery through rules to be prescribed by it. The rules prevailing in that State at the time of the decisions reported in Johnson & Paige's Chancery Reports, I have been unable to refer to, but unquestionably from the citations made in the decisions of Chancellors Kent and Walworth, they must have conformed to the rules of practice in England, as to the matter of opening decrees of this character. See citations in Wooster vs. Woodhull, 1 John. Chy., 541; Lansing vs. McPherson, 3 John. Chy., 425. See also as to the rule in New York, Tripp vs. Vincent, 8 Paige, 180; Millspaugh vs. McBride, 7 Paige, 511. The English practice is in some cases to open enrollments of decrees where the merits have not been heard, if there are sufficient circumstances to call for such action. Kemp vs. Squire, 1 Ves., Sr., 205; Pickett vs. Loggon, 5 Ves., Jr., 785; 2 Smith's Chy. Prac., §§7, 8 and 9. These cases however, are where the default was by the plaintiff at the hearing and are treated by the English Chancellors as analogous to a non-suit at law. The case in 1 Ves., Sr., 205 is not, in my judgment, a precedent to sustain the conclusions which many of the American courts base upon it, nor can I see how it can properly be cited as a precedent to sustain the view that a decree *pro confesso* after appearance against a defendant after enrollment and expiration of the time fixed to show cause and when it has become absolute, can be opened to let in a defence upon the merits upon motion or petition; and if there is any English authority which plainly sustains the power of the principle, I cannot find it.

---

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

---

See Ogilvie vs. Herne, 13 Ves., 565. There are a number of cases where enrollments are opened upon cause shown to allow an appeal. 2 Smith's Chy. Prac., §§7, 8, 9, 23, 24. As to the power we are inclined to follow the American practice, for there should be some method in cases of defaults arising from unavoidable circumstances to afford relief even as against an absolute decree. Unless there is some peculiar operation in the rule pronouncing the decree "absolute" after the expiration of the time limited we think the American authorities show that the court has power to relieve in a proper case. A decree absolute is nothing more than a final decree following a decree *nisi causa* when no cause is shown, and there is no difference, and there is no greater solemnity or inviolability attached to it than to any other final decree.

The power, however, is not to be exercised in cases where the decree has been made absolute in the regular course, and where the defendant has been guilty of neglect and has failed to give attention to the process of the court without the existence of controlling and unavoidable circumstances excusing his delay. The entry of such a decree against a party is not to be regarded as a light matter. Under the rule the setting aside of an order taking the bill for confessed will not be allowed except upon cause shown and affidavit. We think the remarks of the Court of Appeals of Maryland (54 Md., 639) upon this subject are eminently proper. That court says the object of the statute (the law authorizing decrees *pro confesso*) was to provide a just and reasonably expeditious mode of obviating the delays and difficulties to which complainants were subjected by the neglect of defendants and their disobedience of the mandates of the court and no construction of the statute should be indulged that would either reward or encourage defendants in their contumacious neglect of the process of the court when duly

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

served upon them. Decrees are not lightly to be disturbed or vacated after enrollment, though entered upon default of the defendants, and it is only when there are strong and special circumstances shown and the conduct of the party applying is entirely free from well grounded imputation of *laches* or *mala fides* that his application will be entertained and the discretion of the court exercised in his favor, and the discretion to be exercised upon such application must be regulated by law and precedent and not a mere desire to let in a defence upon the merits. It is a mistake to conceive that because a party is in a court of equity, less weighty reasons will excuse his default when he asks to open a decree in equity than is necessary to open a judgment by default at law. In either case the facts produced must show deceit, surprise or irregularity in obtaining the judgment or decree and that the defendant has acted *bona fide* and with reasonable diligence.

What are the facts in this case? On the 28th of April, a paper as follows (omitting title of cause and style of court) was filed. This was considered upon the motion to open the decree:

“Statement of Facts:

“The demurrer interposed in this cause by all the defendants was argued by their counsel in open court at the Spring Term, 1881, and the judge announced in open court from the bench his decree overruling the demurrer. Mr. Frank Fleming, one of the firm of Fleming & Daniel, was present in court and said to W. B. Young, one of the solicitors for complainants: ‘We told Colonel McGary that there was nothing in his demurrer.’ About ten days before decrees *pro confesso* were entered in this case, W. B. Young, one of the complainants’ solicitors, after a conversation with J. E. Hartridge, his associate, upon the subject, started to the office of Fleming & Daniel to notify them that decrees

---

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of C

---

---

*pro confesso* would be entered on the next ret against all defendants in default. He, said You Mr. L. I. Fleming, one of said firm, coming out office and stopped him in the hall way and said ‘Mr. Fleming, does your firm represent Dr. Baldwin case of Stribling and wife against the executrix and ties of O. B. Hart?’ He replied, ‘Dr. Baldwin said thing to us about it, but I don’t know whether he v to represent him or not; I will see him about it’ Young then said, we intend to take a default, aga the defendants whose answers are not filed by the turn day. Said Young then went to R. B. Archibald had appeared for Catherine Hart, and to D. C. who had appeared for Ozias Budington, and said that he would take a default against their clients their answers were filed by the next return day. Archibald replied that he was only employed to e appearance, and D. C. Dawkins, Esq., replied that l get the answer of his client filed by that time if but that his client was in Clay county and he was he could get it by that time. The above named and C. L. Robinson were the only solicitors who had an appearance for any of the defendants herein, except onel McGary, who had appeared for Dr. Baldwin, left the State after his demurrer was overruled. It that the foregoing statement may be read and sh the same force as an affidavit duly sworn to.

“FLEMING & DANIEL, Solic

Marvin, administrator of Hoeg’s estate, recites retained Fleming & Daniel about the third of Se 1880, to defend the suit. He recites the filing of murrer, and states that it was understood that if overruled on notice to that effect Fleming & Danie file further defence. After stating the entry of the

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

**cree** he says that he had been informed by his solicitors and **so** understood that the suit was pending and undetermined, **and** that he is now informed by his solicitors that they had **no** knowledge of either said final decree or the decree *pro confesso* until about the day he was told of the execution **be**ing in the sheriff's hands. He states that neither he **nor** his solicitors had notice of the interlocutory or final **de-**  
**cree.**

The affidavit of Eugene Bigelow, who was the agent of **Mrs.** Hart, the executrix, relates to her case only. As no **a**ppel is taken from the decree, so far as it relates to her, **w**hat her agent states is immaterial. The appeal is from **the** decree dismissing the bill as to the sureties.

J. J. Daniel, of the firm of Fleming & Daniel, swears that **the** firm are the general attorneys of the estate of Hoeg; **that** in September, 1880, he was handed a subpoena issued **i**n this case; that he gave directions to Marvin, the administrator, to procure certain evidence in the case and saw John E. Hartridge, solicitor for the complainants, and W. G. McGary, solicitor for the defendant, A. S. Baldwin; that McGary proposed to him to file a demurrer to the bill; that he, Daniel, expressed a want of confidence in the demurrer, but upon McGary's insisting it was understood that a demurrer should be interposed for all of the defendants, and that if said demurrer was overruled, Fleming & Daniel would then, on notice to that effect, file their plea or answer as the case might be, and that this was spoken with the said Hartridge as well as the said McGary; that the demurrer stood over until May Term, 1881; that it was then argued and overruled by the court; that at the time of said argument he, Daniel, was very sick and had no knowledge whatever that the demurrer had been submitted to the court; that he continued in such health during the summer and until late in the fall of 1881 as to be almost unfit for busi-

---

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

---

ness, and during a great part of the time was not in office nor in the city; that McGary, as he afterwards learned, left the city in the latter part of May (1881) without saying a word about the case to his client or to counsel or turning over the papers to any one; that he continued under the conviction that the suit was standing on the demurrer until a few days ago when he was informed that the final decree had been entered on the 11th of March, 1882, and that an execution was in the hands of the sheriff; that he was confirmed in this opinion by a conversation with John E. Hartridge, leading counsel for the complainant, some time in the early part of this year, (1882) at which time the affiant mentioned the suit to said Hartridge and spoke of the demurrer, and stated that as soon as the decision was decided, if the decision should be adverse to the affiant there would be a defence made by Fleming Daniel to the merits; that said Hartridge said nothing whatever about the demurrer having been argued and decided, but laughingly spoke of McGary's efforts to bring the matter to a hearing, nor did said Hartridge say anything of decrees *pro confesso* having been entered against the defendants and that said decrees had been then entered and that by reason of this conversation the affiant was strongly impressed that the case still stood on the demurrer and that notice would be given. Affiant says further that he knows that the defendant A. S. Baldwin thought the cause was standing on the demurrer until a few days ago.

Defendant, A. S. Baldwin, swears that he entered his appearance in person on the 24th September, 1880, and retained W. L. McGary to defend his interests; that on the first of November 1880, he was advised that his attorney had filed a demurrer; that during the winter of 1880 and 1881, he had frequent conversations with his solicitor.



---

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

---

who seemed confident of the success of his demurrer, but stated that he had not been able to bring it to a hearing; that in the latter part of the month of May, 1881, his attorney left Jacksonville, leaving affiant still under the impression that the demurrer had not been argued; that affiant knew that nothing was required before said demurrer could be heard and rested quiet under the assurance that if the matter was brought up in the absence of his solicitor he would be personally notified of such fact. He then states his recent information as to the proceedings resulting in the decree and execution, and that he had no notice of any of them.

John E. Hartridge, of counsel for complainants, swears that when the rule day arrived for taking a decree *pro confesso*, and long subsequent to the time when the plea or answer of Baldwin and ———; that he was in the Clerk's office of Duval county when Mr. J. M. Barrs spoke to him about the case and asked him if he was going to take a default; that on receiving an affirmative reply Mr. Barrs requested that I defer doing so as he thought the firm of Fleming & Daniel represented some of the defendants; that he consented and did not enter the decree *pro confesso* of that day; that a few weeks after this conversation he called personally upon Mr. L. I. Fleming of Fleming & Daniel, and asked what he was going to do, if he was going to file any defence in this case for Dr. A. S. Baldwin, and he replied, "I do not know whether we represent him or not, but I will see," so——— a while after, the lapse of two or three weeks more, I again called on Mr. L. I. Fleming and asked what he was going to do; that he replied "well, I don't think we represent Dr. Baldwin;" that nothing was said as to any other defendants; that he did not know who they represented, supposed it was Dr. A. S. Baldwin; that the case was mentioned as the Stribling

---

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

---

case, and the question of defence asked as to A. S. Baldwin and that he then communicated these facts to his associate counsel, W. B. Young.

The blanks in the above affidavit are as they occur in the copy of the record made by the clerk.

J. M. Barrs: That he has no recollection, whatever, either of the meeting or the conversation referred to in the above affidavit of John E. Hartridge. He states that for many months since he has been under the impression that the cause was standing upon the demurrer, and that he has at this time known that Colonel Daniel, of the firm of Fleming & Daniel, had a plea drafted to file in this cause as soon as he was informed of the overruling of the demurrer; that he was present at a conversation in the office of Fleming & Daniel between Colonel J. J. Daniel and John E. Hartridge within the last ninety days, as he believes, in which the demurrer was referred to, and that nothing was said which gave him to understand that the demurrer had been argued or disposed of and that he knew of nothing to remove this impression until recently advised that an execution had issued.

So far as the defendants, Baldwin and Budington, are concerned the foregoing statement of facts and affidavit taken with the case as we have narrated it, discloses a good cause to open the decree. After one default of Budington was excused he is guilty of another. His first default was opened by consent. He files his answer. It is excepted to. The exceptions are sustained and he is allowed time to file a proper answer. This he fails to do and even after notice to his solicitor by the solicitor of the complainants of intention to enter this second default, attention is paid to it, so far as this record discloses.

Defendant, Baldwin, states in his affidavit that his counsel, McGary, left Jacksonville in the latter part of

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

month of May, 1881; that about the first of November, 1880, he was advised that his counsel had filed a demurrer; that he had frequent conversations with his counsel in 1880 and 1881, who expressed confidence in his demurrer, but stated that he had not been able to bring it to a hearing. When McGary left Jacksonville ordinary diligence and attention to business required at the hands of this defendant, that he should pay at least some attention to this suit, which he knew was pending. Instead of this he does not give it any attention until after an execution is issued on the 10th of April, 1882, a period of ten months. For this want of attention no unavoidable circumstance and no cause is shown except that he thought he was entitled to personal notice if there was any action taken in the absence of his counsel, and alleges that he had no notice of any of the proceedings resulting in the final decree. He had been summoned, had entered his appearance, and upon the departure of his counsel it was his duty to employ other counsel, or at least *to do something* in the premises. Nor was he entitled to any notice of the overruling of his own demurrer or the intended entry of an order taking the bill as confessed against him. If such laches and want of diligence and attention as is here disclosed is to be excused for want of notice, then the rules which do not require it are practically repealed in all cases, and decrees absolute and final amount to nothing. "If a decree could be vacated upon such ground as is here alleged by the defendant there would be little or no stability in decrees obtained upon *ex parte* proceedings authorized by the rule, and instead of being a means of relief against the neglect and delay of defendants, the rule would furnish the ready mode of protracting the litigation beyond the time required to reach final hearing and decree in the ordinary course of proceedings." Rust vs. Lynch & Jackson, 54 Md., 638.

---

*Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.*

---

In a similar case, *Carpenter vs. Muchmore*, 2 McCarter, 15 N. J. Eq., 124, the Chancellor says: "It was his duty to inquire as to his rights. If he negligently relied upon his mistaken impressions he incurred the hazard of his default in not answering. Almost every defendant against whom legal proceedings are instituted might interpose the same excuse for his laches. It constitutes no surprise in the legal sense of the term."

. As to the case of Marvin, Administrator of H. H. Hoeg: The proceedings of the plaintiffs here were in all respects regular. In fact they gave notice to Mr. L. I. Fleming, one of the firm of Fleming & Daniel, (Marvin's counsel,) that it was their purpose to enter "a default against all the defendants whose answers are not filed by the next return day." Could the plaintiffs do more? It appears that neither Marvin nor those who represented him paid any attention to this notice, and we do not see any reasonable ground upon which to open the decree against him. We do not think that the fact that one of the plaintiffs' counsel is present at a conversation between McGary and a member of the firm representing Marvin, administrator, in which it was understood that a demurrer should be interposed for all of the defendants, and that if the demurrer was overruled, they would, upon notice to that effect, file their plea or answer, fixes an obligation upon plaintiffs' counsel to give defendants' counsel notice of the overruling of their own demurrer. To bind him to give such notice he should have so expressly agreed. The fair conclusion here would appear to be that as Fleming & Daniel had no confidence in the demurrer and McGary had, that he, McGary, was to manage it and give notice of the result.

Again, the demurrer here was overruled in open court in the spring of 1881, one of the members of the firm of Flem-

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

ing & Daniel being present and making, a remark at the time, which shows that the action of the court was known to him. While it is true that Colonel Daniel was sick at this time, and that he continued in such health as to be almost unfit for business, and during a great part of the time not in his office or in the city until late in the fall of 1881, yet the default here was not entered until November, 1881, and the final decree did not become absolute until after March, 1882. So far as the conversation with Hartridge is concerned, he was, under the circumstances, under no obligation to advise that the demurrer was overruled, or that he had entered or intended to enter a decree *pro confesso*. He was silent as to any decision and did no act to mislead any person. A person is not bound to communicate his intention to take a decree *pro confesso*, or that he has taken one because the other party advises him that it is his purpose to file an answer. This in principle is the decision of Lord Chancellor Lyndhurst in *Barnes vs. Wilson*, 5 Eng. Chy., 486, and even if the firm of Fleming & Daniel were entitled to notice, certainly the notice given by the plaintiffs' counsel to one of the firm, of intention to take the bill for confessed against all the defendants who had not filed answers, was all that could be required.

Again, Fleming & Daniel entered their appearance for Marvin on the 16th of September, 1881, which was *after the demurrer was overruled*. They had simply to open the papers to discover the fact. In this case the plaintiffs did more than the law required. Indeed they seem to have been anxious to give all of the defendants an opportunity to be heard, postponing for months the entry of the order taking the bill for confessed, which they could have entered on the rule day succeeding the overruling of the demurrer which was "interposed in this cause by all of the defendants," and even then giving notice (which was not required)

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

of intention to enter the order taking the bill for confessed. We do not think sufficient cause was shown to open the decree. We reach this conclusion with regret, but if we are to have rules they must be enforced.

Those who seek the courts for redress of wrongs or the defense of rights must learn that the final adjudication of court either of law or equity is a matter of serious consequence, and after an appearance a reasonable degree of diligence and attention must be required. A brief commentary on some of the cases upon this subject is not deemed improper. *Kemp vs. Squires*, 1 Ves. Sr., 205; *Pickett v. Loggon*, 5 Ves., 705. These were cases where the bill was dismissed for default of the plaintiffs. They are not decrees *pro confesso* where the practice is controlled by established rules of which parties must take notice. Lord Loughborough assimilates the case to that of a non-suit law. Lord Raymond, 1308; 3 Wil., 149. The first case, 1 Ves. Sr., 205, is based upon two cases, one of default plaintiff to hear judgment, the other of a decree dismissing an original bill and taking a cross bill for confessed. The application to set aside in this case was based upon irregularity and "bad state of mind" of plaintiff. Lord Hawke in *Kemp vs. Squire* stated that the case was "very near to that" of the case of a plaintiff remaining an infant "till" after the hearing of the cause. Of this case (*Kemp vs. Squire*) it is said in a note to §8, 2 Smith's Chy. Pr. p. 7, "that it appears that the solicitor for the infant plaintiff neglected to instruct counsel to appear on the hearing and there appear strong reasons to suppose that he acted collusively. See Dick. 131." Under the English practice there was a difference between decree taken upon a *pro confesso* after an appearance as in this case and those under the statute of 5 Geo. II., Chap. 25. In the case *Ogilvie vs. Herne*, 13 Ves., 565, is held that a "dec

---

Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.

---

taken *pro confesso* in the ordinary course after appearance not under the statute can be impeached as any other decree only directly by the bill of review or a bill to set it aside for fraud not collaterally by an original suit seeking a decree inconsistent with it." See, as to this case and other cases upon the subject, note 3 to Attorney-General vs. Young, 3 Ves., 209; Geary vs. Sheridan, 8 Ves., 191; Williams vs. Thompson, 2 Bro. Chy. Repts., 280; Buckman vs. Peck, 3 John. Chy., 414. This case is so reported as not to be clearly understood. It seems that a decree by default, whether final or interlocutory does not appear, was entered in June; that the answer was filed in the same month, but not in time and the motion was grounded upon merits, and that "the delay in filing the answer arose from *unavoidable circumstances*." The Chancellor granted the motion upon payment of costs of the default and subsequent proceeding. See also Lansing vs. McPherson, 3 John., 424, where the application was denied. Tripp vs. Vincent, 8 Paige, 179. The last case was that of decree against a mortgagor, and two of his judgment creditors, the judgment being joint. There was no service as to one of the judgment creditors, and the other had ascertained by the examination of the complainant in another suit that his mortgage was fraudulent or but a part of it was due. In the case of Wells vs. Crugar, 5 Paige, 164, the defendant had not appeared, resided out of the State, and he had been served during a temporary visit and the decree was had without notice to him or his agent. The case of Millspaugh vs. McBride, 7 Paige, 512, amounts almost to a decision, according to its language and headnote, that a simple showing of merits is enough to call for the favorable exercise of this power, a doctrine which we do not propose to establish in this State. We do not think, however, that the facts in the case justify the broad language of the Chancellor. There was no laches

---

*Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.*

---

in the party. He stated his case to his counsel and counsel advised him that it was useless to attempt to fend upon the grounds given. Nor can it be said there was neglect in the counsel because he acted upon clients' representation of their case. The failure arose of a very natural misapprehension upon his part as to case of his clients and his clients' misapprehension as to nature of the suit. We deem it unnecessary to comment upon the cases. The subject will be found discussed further in the following cases: *Burch vs. Scot Gill & John.*, 426; *Oliver vs. Palmer*, 11 *Gill & John* 149; *Hart vs. Lindsay*, *Walker's Chy. Repts.*, 72; *Carter vs. Muchmore*, 15 *N. J. Eq.*, 123; *Miller vs. Hild Wife*, 3 *Stockton*, 25; *Brinkerhoff vs. Franklin*, 21 *N. Eq.*, 336; *Disbrow vs. Johnson*, 18 *N. J., Eq.*, 37; *To vs. Nance*, 3 *Tenn. Chy.*, 264; *McMicken's Exr's vs. Pe* 22 *How.*, 282. In Illinois and Mississippi the matter opening such a decree is controlled by statute. *Collins Crotty*, 65 *Ill.*, 545; *Norton vs. Hixon*, 25 *Ill.*, 457; *Gowan vs. James*, 12 *S. & M.*, 445. *Erwin vs. Vin* 1 *Munf.*, 267, gives the rule in Virginia.

Nor do we think that the case is one of such hardships as to imperatively demand a favorable exercise of the discretion. The question is whether a ward shall realize sum admitted to be due her by her guardian, whose estate is insolvent, or whether sureties upon his bond shall pay to her, the defence being:

1st. The taking by the ward nine months after she came of age of a promissory note which extended the time of payment of the sum of money found due upon account between the guardian and his ward twelve months.

2d. Laches in not making the demand for nine months.



---

---

*Stribling et ux. v. Hart, Executrix, et als.—Opinion of Court.*

---

---

after the giving of the note and after the estate of the guardian was insolvent.

This defence, except the matter of laches, is, as remarked by the respondents in their brief, the claim of "a technical release." There was, however, no release, and the authorities cited upon that subject are not in point. See Part 2, Vol. 2, *Leading Cases in Eq.*, 996, 997.

As to the facts: It is apparent that all the accounting done here was by the guardian. The ward simply assented to what the guardian said. It appears that from the time she was ten years of age she resided with her guardian, who was her uncle, and that even after accepting his note for the same, for which he offered to give it and for which he drew the receipt, she lived in his family until his death, which occurred about two years after she signed the receipt and the guardian gave her the note. Up to this time and beyond it the influence of her guardian and uncle continued, as the evidence shows.

She was married in 1879, and this suit was brought in 1880. Whether the simple acceptance of this note under the circumstances and the delay will release the sureties upon the bond is the question, a question in which I do not think the accepting of the note or the giving of the receipt under the circumstances should have any influence.

She acted without any advice, in fact, without any examination of accounts and simply did what she was told to do by one who had occupied the place of a parent from the time she was ten years of age, the transaction occurring in a room in her uncle's house, no one being present except herself, her uncle and her aunt, the guardian saying at the time that he "would advise with her and whenever she wanted it he was willing and ready to give it." As to the question of laches independent of the matter of giving

---



---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Syllabus.

---



---

time affecting the liability of the surety, see leading case in Equity, 1,000, 1,001.

All of the proceedings in this case subsequent to the final decree of the 11th of March, 1882, except the issue of process to enforce it, we think should be set aside, and that decree should stand.

The order of the 2d day of May, A. D. 1882, and the final decree of the 22d of March, 1883, are reversed, and the final decree absolute of the 11th of March, A. D., 1882 will stand as the final decree of the Circuit Court, subject to such proceedings as may be appropriate for the correction of any error therein, if error there be.

---

EPPINGER, RUSSELL & CO. ET AL., APPELLANTS, VS. FRANK CANEPA, EXECUTOR, APPELLEE.

FRANK CANEPA, EXECUTOR, APPELLANT, VS. EPPINGER, RUSSELL & CO. ET AL., APPELLEES.

1. Upon a bill by creditors against an executor, alleging deficiency of personal assets and insolvency, and praying a discovery of assets, their sale and the application of the proceeds to the debt, it is erroneous to direct an execution to issue against the executor as for a *decuratit* to the extent of the estimated value of the assets in his hands subject to administration. To the extent that the assets consist of money in his hands, he should be directed to pay the same into the registry of the court; and if a sale of real and personal property of the estate is necessary to the satisfaction of the debts proved before the master, it should be decreed. An execution against the executor should issue only for the sum with which he is chargeable on account of losses occasioned by negligence or failure in the discharge of his duty, or like causes. It should issue then only in the event that

---

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Syllabus.

---

---

money and the proceeds of the sales of the property are not sufficient to satisfy the claims of the creditors. Creditors have such equities whether the estate is solvent or insolvent. It is the ordinary bill by creditors for the marshaling and administration of assets of an estate.

2. When the responses of the answer are as broad as the allegations and interrogatories of the bill, there is replication to the answer, and the general facts to be proved are put in issue by the pleadings, it is sufficient. Proof of a fact not specifically alleged, but embraced substantially in the case made by the answer and the bill, is admissible.
3. Two life insurance policies, each for one thousand dollars, are taken out by A payable to himself. He subsequently places on each policy in writing a direction to pay the money upon one policy to one person and upon the other policy gives a like direction to pay its proceeds to another person. There is no evidence that the insured at the time these contracts or his direction was given was indebted: *Held*, That under the statute of this State the written direction proved to have been made by the insured, is a written declaration in the policy of the person for whose use and benefit it is intended, and that under the statute such named persons are entitled to the proceeds of the policies as against creditors of the deceased insured.
4. In a life insurance where the premiums paid are reasonable in amount, looking to the condition in life of the assured, and there is no proof of an actual purpose at the time the contract of insurance is entered into to divert the money from anticipated debts, and to defraud creditors, the statute protects the proceeds from the claims of creditors in favor of the beneficiary named in the policy, and upon the death of the assured whether he be solvent or insolvent the amount of such life policy is exempted and protected from the claims of creditors.
5. Where plaintiffs allege the existence of a partnership between themselves and a party deceased in a suit against the executor of the will of the deceased party such plaintiffs are incompetent witnesses under the statute to establish transactions or communications between them and the deceased party of which they claim a partnership resulted, no evidence of such partnership appearing upon the books of the firm.
3. Where the conflict in the testimony is clear and the court cannot upon a review of the evidence say that the findings of a master

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Syllabus.

---

and a referee are wrong, they must be sustained. In a case of simple conflict the court cannot direct the finding to be for one party rather than the other.

7. An executor is entitled to credit for sums paid an attorney for legal advice when the charges are reasonable and proper in amount.
8. The executor in possession of the real estate of the deceased, when the rents thereof are necessary to the satisfaction of the debts, is personally accountable to the creditors for the rental value thereof when the circumstances of the case disclose a failure to realize rents and neglect to exercise the diligence and business activity required at his hands in the management of the property.
9. The executor collects money of the estate and permits it to remain in bank uninvested. It not being affirmatively shown that no good security could be found on which to put it out at interest, the executor failing to pay it into court, is chargeable with it under the statute as money retained on interest by him, and it should enter into his annual returns as money so retained, interest being added to the principal annually.
10. Where the executor fails to file an inventory of the personal property of the estate, neglects to make his annual returns, and fails generally to discharge his duty, he not only forfeits his commissions but is also properly denied any compensation for general services.
11. The subject of an exception to the report of a master and the finding of a referee is a particular account which the master has stated from the books. The exception is overruled by the referee, he finding upon comparison of the account with the books from which it is taken that it is correctly stated. This court must, under these circumstances, presume the account to be correctly stated, the books not being before us.
12. It is too late to urge here exceptions to accounts which the referee finds were admitted by the party when before the master, the record disclosing that the accounts went before the master without objection.

Appeal from the Circuit Court for Duval county.

This case was tried before Mr. John C. Cooper as Referee. The facts are stated in the opinion.

*H. Bisbee, Jr.*, for Eppinger, Russell & Co.

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Argument of Counsel.

---

To constitute a title by gift there must be something more than an expressed intention to give; the intention must be consummated by an actual delivery and a parting with all dominion over the thing given by the donor beyond the power of revocation. 1 Fla. Rep., 63; 4 Fla. Rep., 474; 80 N. Y., 422; 70 N. Y., 212; 68 N. Y., 625; 2 Baileys, S. C., 588; 35 N. Y., 215; 75 N. Y., 134; Bliss on Life Insurance, §330, p. 546.

Assignment: Where the insured assigned by an endorsement on the policy to a third party to pay a debt, the insured retaining possession, and subsequently died insolvent, *held not valid*, and that the proceeds were assets. *Palmer vs. Merrill*, 6 Cush., 282; Bliss on Life Insurance, §329.

But here there is no proof of any assignment in writing, nothing more than a memorandum, or the policy expressing an intention of giving the proceeds to the minor children of Barker, and thus purely voluntary.

The testator kept possession of the policies until he died. He instructed the draftsman of his will to bequeath them to these two children, and they were so bequeathed, thus showing that he regarded what he had written merely as memoranda. The will was executed on the 6th and he died on the 13th of December, 1875.

Defendant's last resort: Having failed to prove an assignment as alleged in the answer; having failed to prove a valid gift, he resorts to the parol testimony, which was admissible to prove either assignment or gift, *to prove that the testator had these children in his mind at the time he obtained the policies*, as the beneficiaries thereof; and therefore they are the beneficiaries as completely as if they had been named in the policies as such.

Now in the first place, the defendant having put his defence upon title in the children by *assignment* by the testator, and proceeds to trial, and rested his defence on that

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Argument of Counsel.

---

theory, he must be limited to it. It is true he was allowed to examine Mrs. Baker as to the oral statements of the intention of Streiber without objection, while complainants were taking rebutting testimony. Why? Because to prove an assignment or gift, such testimony was admissible, and could not be objected to when offered for that purpose at the proper time. This, offered after defendant had closed his case, it was not objected to being in the discretion of court to receive it.

But if the point had been made in the answer, that these children were the real *beneficiaries* and proof of it attempted by parol testimony, the court can readily see it would have been objected to as inadmissible to vary and contradict a written instrument.

I insist, therefore, that it is proper to make this objection now, otherwise complainants are taken by surprise and injured by allowing defendant to change his defence at the hearing of the cause and without notice. By doing this defendant is not injured, as it is manifest that had Mrs. Barker's testimony as to deceased's oral statements been objected to and ruled out, he could not have supplied it by better testimony. 14 Peters, 448.

We say then to hold these children are beneficiaries, the same as if named in the policies, on the ground that the insured stated to their mother that he had taken them out for their benefit, would utterly destroy the rule that oral testimony is not admissible to vary a written instrument.

Had the testator so intended he would have had the names of the children inserted in the policies. That he did not proves that his last intention was that they should not be.

Besides, Mrs. Barker's testimony, as to what the testator said two or three years before his death, especially what he said in 1870, *before* the date of the policies, *should*

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Argument of Counsel.

---

*not have much weight.* It is within the spirit of the statute prohibiting such testimony. It is the testimony of the mother of the children, respecting conversations with the deceased; it is adduced at a stage of the cause when it is apparent her cause was lost without it, and the temptation is too great to color the testator's alleged statements to suit the exigencies of the case to entitle such testimony to be relied upon.

In a similar case proof of oral statements of the insured that he intended the policy for his son, the latter not being named therein: *Held*, inadmissible. 99 Mass., 342; Bliss on Life Insurance, p. 635.

It is also held that insurance policies prove no exception to the rule that oral evidence cannot be received to vary written instruments. 23 N. Y., 516; 17 N. Y., 199, note.

It follows that the proceeds of the policies are assets to be accounted for by defendant.

The bill joined defendant as executor and guardian of the minor children in question. It avers that he qualified as executor on the 16th of December, 1875, and as guardian on the 16th of May, 1876; all averments as to Canepa being guardian were stricken out of the bill, on demurrer for multifariousness.

The answer admits he became executor as charged, the proof shows that he received the drafts paying these policies about the 4th or 5th of May, A. D. 1876, such drafts being payable to him as executor, and he admits in his testimony that he received the money.

The answer avers that the proceeds of policies were collected by the guardian of the children, (the name of the guardian not being given,) and is held for their benefit. Replication puts this averment in issue, and there is no proof whatever that any guardian has ever been appointed. The proof then, showing that these moneys were assets, that

---

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Argument of Counsel.

---

---

defendant reduced them to possession, and that he is the executor, we submit that it is manifest, the defendant as executor is the proper party to proceed against to subject these funds to the payment of testator's debts, and this too, whether the claim of the children be rested on the ground of assignment, gift or under the will. He reduced these moneys to his possession as executor, in the eye of the law; his subsequent parting with possession of them, is his own wrong, and does not relieve him from accounting for them any more than the voluntary disposition of any other assets of the estate would relieve him.

If any doubts arise as to what may have been the language of the policies, they should be resolved against respondent. *Prima facie they are assets*; appellants have proven they were made payable to Streiber himself. To support the contrary the burden of proof is upon defendant. He should have produced the policies. He has not done so, nor shown satisfactory reason for their non-production. Schnabel, the agent of the insurance company, resides in Jacksonville, and examined as a witness. The policies were taken out from this agent's office, and it would have been an easy matter to have introduced a sworn copy of the policies.

The statute of Florida, Chapter 1864, has no application. Testator left neither wife or child, and no *beneficiary is named in the policy other than the assured*. It is only such policies as the statute describes, the proceeds of which cannot be reached by creditors. Were it otherwise, if deceased had died intestate, no one could take, and the proceeds would escheat to the state. Such an absurdity was never contemplated by the law-makers.

Again the statute speaks of policies *left* by a person at his death. These policies were not *left* by deceased; he bequeathed them to these children *seven days* before his



---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Argument of Counsel.

---

death. He had thus disposed of them. But he was then insolvent; they go to the children subject to the rights of the creditors; *hence the necessity* of ignoring the will and claiming by some title *prior* to the date of testator's indebtedness. The statute not applying, the proceeds are assets at common law. *Hathaway vs. Sherman*, 61 Me. Rep., 466; 37 Me. Rep., 359; 3 Sneed, 565.

Second ground of appeal: Because the referee allowed a credit of \$1,800 to Streiber in his accounts with Eppinger, Russell & Co., on account of salary from April 1st, 1883, to April 1st, 1874.

The testator kept the books of the firm of E., R. & Co., and the firm's account sued on is in the hand writing of deceased, except certain specified items of debit, entered by John S. Driggs. These specified items are all sworn to by Synox, the bookkeeper of the firm in New York, who attaches to his testimony vouchers for all such debit entries.

At Streiber's death the books kept by him, the entries therein being in his hand writing, showed an indebtedness of about \$8,000. No credit had been entered by Streiber subsequent to March, 1873.

Russell and Eppinger testify that about the first of April, 1873, Streiber became a member of the firm with one-sixth interest.

That about one year thereafter, in March, 1874, the firm met with very heavy losses, of which Streiber's share was \$10,000; that Streiber became alarmed at such a loss, said he could not risk being a partner longer, and that it was agreed that he should retire from the firm *without paying any portion of the losses*, and thereafter, to wit: after April 1st, 1874, he, Streiber, should have a salary as bookkeeper and agent, of \$3,000 per year. After testator's death Driggs succeeded him as bookkeeper, and on Russell's instruction credited Streiber's account with \$4,250, his salary from

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Argument of Counsel.

---

April 1, 1874, to September 1st, 1875, when he ceased work. But this credit of \$4,250 was ordered and given on the basis of a partnership as testified to by Russell and Eppinger, which would leave one year ending April 1st, 1874, during which Streiber, being a partner, would have no compensation, *and would be relieved of \$10,000 loss.* On this theory the credit was ordered of \$4,250. Master and referee find there was no partnership, and credit deceased with \$1,800 for salary for the year. Appellants contend he was a partner, because that was the salary he was receiving just prior to April 1st, 1873.

The question is, is a partnership proven? Appellants contend that it has been established, and rely upon the testimony.

2d. We rely upon the fact that the testator borrowed of Russell \$500 December 19th, 1874, for which he gave his note, payable with interest. This shows that testator, feeling that he was largely indebted to the firm, thought it more honorable to borrow the money at interest than to draw more money from the firm. If he had been entitled to credit himself with a salary of \$1,800 for the year in question he would not have borrowed the money. Such credit would have nearly equaled his indebtedness at that time.

3d. Upon the various conversations about being a partner or not, *after the heavy losses of the spring of 1874*, testified to by Barker, Moody, Driggs and Gumming.

*The weight of evidence establishes a partnership, and that in the spring of 1874, by reason of heavy losses, the deceased began to agitate the propriety of retiring, and returning to a salary, and it was finally decided he should have a salary from April, 1874, of \$3,000.*

But if there was no partnership, then all the parties should be remitted to their status on April 1st, 1873, Strei-

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Argument of Counsel.

---

ber credited with his salary at \$1,800 per year up to September 1, 1875, and the firm not charged with salary at \$3,000 per year from April 1st, 1874, to September 1st, 1875.

This last charge of salary at \$3,000 per year, or credit to Streiber of \$4,250, was made on the statement of Russell to Driggs, but if all the other testimony, showing a partnership, is to be ignored and rejected, then that part of Russell and Eppinger's testimony relative to a salary at \$3,000 per year, should likewise be rejected.

Otherwise, *E., R. & Co., would be the victim of their own integrity.* Had Eppinger and Russell *kept silent* nothing would have been known about the partnership, nor the credit of \$4,250 for services subsequent to April 1st, 1874, for Streiber had not given himself a single credit subsequent to April 1st, 1873, (the date of the alleged partnership, thus showing some change in his relation to the firm) and the result would have been that defendant could not have proven that deceased was entitled to any other credit than \$1,800 per year subsequent to April 1st, 1873, or \$4,250 to September 1st, 1875, date he ceased work. The result is, if this credit of \$4,250 and the \$1,800 given by the referee for the year ending April 1st, 1874, stands, the firm of Eppinger, Russell & Co. lose by telling the truth \$1,700.

It is submitted that this would not be justice, and that the act of relieving Streiber of a loss of \$10,000 was generous treatment, deserving a better return than an infliction of a further loss of \$1,700.

It is thus seen that there *was no motive* for Eppinger, Russell & Co. to establish a partnership and credit deceased with the \$4,250; for without any partnership being established, and E., R. & Co. remaining silent, he would have credit for \$4,350, just one hundred dollars more, too insignificant a sum to tempt even a scoundrel. We submit that

---

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Argument of Counse

---

---

the partnership is established, and the credit of \$1,800 enormous.

The third ground of appeal: Allowing respondent credit for \$50 paid McDonald and \$100 paid Baker for professional services, when such reckless disregard of his trust the trustee is shown, as this case presents, he should have credit for counsel fees.

He was manifestly acting in collusion with the Barkers. He put them in possession of the real estate to enable them to rent theirs, and turned over proceeds of insurance policy to them with improper haste.

The little money he has had on hand, after paying taxes on the real estate occupied by the Barkers, or insurance on the houses, while not charging them with any rent, has remained unproductive, and at the same time undisputed claims against the estate drawing interest remain unpaid to this date. It is submitted that the decree is correct except on the grounds upon which the appeal is presented.

*W. B. Young* for Canepa.

The demurrer for complainant's bill was properly sustained. The executor represents distributees and legatees and they cannot be heard but through him. Johnson v. Lewis, 1 Rice's Eq., 40; Story, Eq. Pl., §141.

The executor is the person constituted by law to represent the assets of a deceased person, and to answer all demands upon them, and therefore where the object of a suit is to charge such assets it is sufficient to have the executor before the court. Daniels' Ch. Pld. & Prac., 301; Story, Eq. Pl., §140; Head vs. Perry, 1 Monroe, 225.

No suit can be maintained against a guardian as such.

If the creditors were seeking to reach a fund which was not assets then suit should have been brought against

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Argument of Counsel.

---

claimants and holders of such fund and the executor should not have been joined as a defendant in such suit.

There are two reasons why the executor should not be charged with the proceeds of the life insurance policies:

1st. The statute says that whenever any person shall die leaving insurance upon his or her life it shall go to the wife or husband and child or children, or to any other person for whose use it is declared in the policy. Now it is clear that if no one is specially named in the policy as the beneficiary it will go to the wife or child, if any there be, and if any one is specially named, to the person named. But there might be no wife or child and no one might be named in the policy, or, as in this case, the deceased might be named. In such case, in the absence of a statute to the contrary, the proceeds would then become assets in the hands of the executor for the benefit of creditors. But the statute comes in, in the next clause, and says that creditors shall not obtain the benefit *unless the policy declares* that said insurance is for their benefit. The words proceeds thereof, refer to such policies as are mentioned in the statute, and they are policies upon the life of one who dies in this State, whether any one is or is not named in them as beneficiaries. To hold that creditors can share in the proceeds of a policy of life insurance which does not declare that it is for their benefit would be to hold that the latter clause of the statute was mere surplusage.

The courts will give force and effect to every word in the statute, if possible, and will not presume that any part thereof is surplusage. *Shever vs. Hays*, 3 Cal., 115; 81 Cal., 412; 28 Cal., 142; 32 Cal., 499.

The policies in question were made payable to Streiber, the deceased, but from the very nature of the contract they could never be paid to him, so the conclusion is inevitable that he took them in his own name for the benefit of

---

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Argument of Coun

---

---

some one else. If the name of the person for whose benefit the insurance is obtained does not appear upon the face of the policy, extrinsic evidence may be resorted to to ascertain the meaning of the contract, and when thus ascertained it will be held to apply to the interests intended to be covered by it, and *they* will be deemed to be comprehended within it who were in the mind of the party when the contract was made. *Pace vs. Pace*, June Term, 1882.

The evidence indisputably shows that the policies taken out for the benefit of the Barker children.

The above is the rule of law independent of the *status* in *Pace vs. Pace*, and authorities therein cited.

There is nothing to show that creditors were in the mind of Streiber, but on the contrary these creditors all became such after the taking out of the policies. *Pace vs. Pace*.

The executor, the legal representative, had no title and was in no way entitled to possession of this fund. *Pace vs. Pace*.

2d. The policies were choses in action, and if the Barker children were not beneficiaries therein from the time the policies were taken out, then they belonged to Streiber until he transferred them, and if he disposed of them in his life time the executor had no right to them, and they, or the proceeds thereof, are not assets of the estate.

The evidence shows that Streiber did part with them during his lifetime.

The only way for a creditor to reach any property which his debtor may give away during his life, and which the creditor is entitled to subject upon the ground that his debtor is insolvent and must be just before he is generous, is by proceeding against the parties to whom it is given in fraud of the creditors' rights, and the executor as such would be a proper party.

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Argument of Counsel.

---

The executor has no right to the proceeds of the two policies, and is not chargeable therewith.

The executor should not be charged with interest on the funds in his hands, unless guilty of negligence or unreasonable delay in settling, the evidence showing that he has never used them or made interest on them. The statute only requires executors to lend out the money of minors in their hands and makes them liable for interest on the surplus of the estate remaining in their hands and unemployed, after settlement of their accounts. McC., p. 94, §63; 1 Johnson's Ch., 620 and 527; Dexter vs. Arnold, 3 Mason, 284; Spruil vs. Cannon, 2 Dev. & Battle, Eq. Repts., 400; Chase & Crabb's Executors vs. Lockerman, 11 Gill & Johnson, 185, (35 Am. Dec., 277.)

The executor should not be charged with the rental value of the real estate. He testifies that he endeavored to obtain a tenant and failed, and got the Barkers to move in to protect the property. Mrs. Barker testifies that it was difficult to obtain a reliable tenant in that locality. There is no evidence to show that he would have procured a responsible tenant. The statute does not require the executor to rent out the real estate.

A mere failure to file his annual accounts is not such misconduct as will work a forfeiture of his compensation. Such failure is a mere irregularity and the statute imposes no penalty for the failure. The executor should not be deprived of his compensation except for gross and wilful misconduct. Gould vs. Hayes, *et al.*, 19 Ala., 459; Pearce and Wife vs. Darrington, 32 Ala., 271.

The amount paid by the executor to counsel for professional services was properly allowed as a credit. 2 Henning & Mumford Repts., 9; Lomax on Ex'rs, Vol. 2, page 331.

*John Earle Hartridge* on same side.

---

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

---

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The trial here was by referee.

This is a creditor's bill, charging the respondent as executor under the will of Wm. R. Streiber, deceased, with the reception of assets, consisting of real estate, on which there are two dwelling houses, some three hundred dollars of personal property, about \$1,400 in money, and another item of money to the amount of about \$2,000, the proceeds of two life insurance policies upon the life of deceased, payable to the deceased by name.

The bill charges that the creditors duly presented demands to the executor, to the amount of several thousand dollars, which he refused or neglected to pay; that he was wasting the assets; had neglected to make any settlements in the Probate office, or reports showing the cash assets received, and prayed a discovery as to the amount of estate received, and for an account and decree. Plaintiff also alleges that the estate is insolvent.

Defendant answers, admitting his appointment and qualifications as to executor; that he took possession of the assets and effects of the estate, with the exception of papers which plaintiff, John K. Russell, had taken from the possession of Mrs. Barker, the person in whose custody and control they had been kept by Streiber; that among the papers which he, as executor, received, there were no letters of Eppinger, Russell & Co., or of the plaintiffs; that he found only some receipts for some small bills from the first of the year 1873 to the middle of the year 1874. He denies that the testator was indebted as alleged in the bill and sets up facts which he claims show that the account is not as stated. He denies also that the estate is insolvent and admits the reception of certain moneys and effects for



---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

which he is accountable. It is not deemed necessary here to insert at length each of the allegations of the answer, as principal matters here involved arise upon exceptions to the findings of the referee, and the facts as they appear from the pleadings and evidence will be stated so far as deemed necessary in the consideration of the matters of exception which are brought to our attention by the appeals.

After demurrer sustained to the bill it was amended and there was replication.

After interlocutory degree of reference, report of a master and hearing by the referee, there was a decree by the referee against the defendant. This decree was based upon the report of the master, to which exceptions had been filed, and the referee's action in allowing and overruling these exceptions occasioned the appeals in this case. Both plaintiffs and defendant appealed.

We examine first the grounds of appeal set up by the plaintiffs in their petition of appeal.

It is insisted, first, that the proceeds of two policies of insurance upon the life of the testator, Wm. R. Streiber, were assets of his estate, subject to the claims of plaintiffs, and that the finding of the referee to the contrary was error.

As to the matter of money realized by Streiber from these policies:

The plaintiffs in their bill allege simply, that the executor had collected considerable amounts of money due on policies of insurance on the life of the testator, Streiber, issued to the testator by the Continental Life Insurance Company of New York.

Defendant, in his answer, replies that the sums of money payable on the policies of insurance did not constitute assets of the estate; avers that during the lifetime of Streiber and before his last illness, he assigned and transferred

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court—

---

said policies to Hattie Barker and John Barker, minor children of Richard F. Barker and Mary Barker; that they had been collected by their guardian and were held by him for their use and benefit.

The next reference to this matter in the record is the testimony of the executor. He says that he received the sum of \$1,960, 56-100 on the policies of insurance from George Schnabel, the agent of the company in Jacksonville. The agent, Schnabel, testifies that on the 14th of May, A. D. 1870, he issued two policies of insurance upon the life of Streiber, each for the sum of one thousand dollars, and that the policies were "made payable to himself," Streiber; that after the death of Streiber they were paid to F. Canepa, executor and guardian.

Mary Barker testifies that she was acquainted with Streiber from the time he came to the firm of Eppinger, Russell & Co., and for about six years before his death; that she took care of him during his last illness; that he placed his will in a box and told her to take care of it. The testimony of Richard F. Barker, the husband of this witness, shows that he also was on intimate terms with Streiber and that in the summer or early fall of 1874 he went to New York with him.

The executor being recalled, says that he saw the insurance policies left by Streiber; that when they were paid he gave them to Mr. Schnabel, the agent of the company, and has not seen them since. This witness says that "on the body of the policy was Mr. Streiber's name, I think, and on the face of it was written in Mr. Streiber's handwriting to pay the money, \$1,000 each, to the Barker children. Upon cross-examination he says that "when Streiber died these policies were among his papers, at his house; that he did not recollect the date of the writing of Mr. Streiber on the face of the policies."

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

George Schnabel, the agent, being recalled, says that the policies were paid in May, 1876. The payment was in drafts in favor of Mr. Canepa, but whether they were drawn to him as guardian or executor he does not recollect. This witness being asked by the defendant's counsel whether there were any endorsements on the policies, and if so, what they were? states that the policies were endorsed in the hand-writing of Streiber, to the children of Mrs. Barker; that he does not remember on what part of the policies the endorsements were made, but probably on the back; that both policies bore the same endorsement; that it was in ink; that the children were mentioned by name, and that he does not remember whether they were signed by Streiber or not. He states that an effort has been made to obtain the policies, but it failed; that he does not remember the date of the endorsements or that there was any other thing written upon them by Streiber except as stated. He states that the drafts paying the policies were "by his best recollection to Mr. Canepa, as executor."

Mary Barker, the mother of the children, being recalled, testified that Mr. Streiber lived in the same house with us, when we lived at the mill (the mill was the place of business of a lumber firm, for which Streiber was a bookkeeper); that he lived with the family for about three years; that he used to come to her house every day before, for about six years after he came to take his meals with us and after he left the mill. Upon being asked whether about the year 1870, she heard Streiber say anything in regard to getting his life insured, she says she does not know the year but he did speak about the policies and we laughed at him and asked who he was going to take them out for, as he had no family; that he said he was going to get one for Hattie, meaning Hattie Barker, and one for John, meaning John Barker. He also said that he would get them out

---

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

---

for their education, and some time after that, we having more talk about it, he brought the policies home one evening, and said he had got them, and sat right down and put Hattie's name on one policy and Johnny's on the other; that she don't know what the writing was, but saw the names of Hattie and John. This was done in my presence two or three years before his death; that when he made his will he took these policies from his box and showed them to Judge Emmons who was the person who wrote the will. He then put the policies and the deeds back in the box and handed the box to me, and told me to take charge of them; he had known my son Johnny since he was a baby; that he would carry him to town with him; he did not know Hattie so well; he took Johnny with him to New York, and the last time he was in New York he brought the two children from New York, where they were. It is not deemed necessary to insert more of the testimony of this witness. It shows that the kindest relations existed between the parties, and that Mrs. Barker nursed Mr. Streiber for ten weeks during his last illness; Streiber died testate and by his will bequeathed these policies to the children. The executor here was also the guardian of the children. He swears that he turned over all the money realized from the policies under an order from the Probate Court of DeWitt county, to the guardians of the children, and there is in the record a copy of the proceedings of the Probate Court showing that fact.

The testimony establishes as matter of fact that each of these policies was taken out in the name of the testator himself; that in pursuance of an intention to apply the proceeds of the policies to the two children, Hattie and John Barker, he placed upon either the back or face of one policy a direction in writing, to pay the money to one of the children; and that he made a like direction to pay to

---

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

---

money upon the other policy to the other child. At the date of the policy, A. D. 1870, it is not pretended that the party was insolvent, or that the debts set up in the bill and proofs existed, and it is established that he was attached to the children, and that the most friendly relations existed between the insured and the father, the mother and these children.

The proof shows that the testator left no wife or children surviving him. There is no proof of the existence of any heir at law, and there is a testamentary disposition of the policies to the children corresponding with the directions made in each policy itself.

The question here is, are the proceeds of these policies assets of the estate subject to the claims of creditors.

It was insisted in the argument that there was here no gift or assignment of the policies to these children. This question we deem it unnecessary to decide, as a technical assignment or gift of a life policy is not required under the statute to protect the proceeds from the claims of creditors if the fact be that it is not declared in the policy that the insurance was effected for the benefit of a creditor or creditors, and there is in substance in the hand writing of the assured a declaration in the policy of the person to whose use and benefit the policy is declared to be.

Streiber here took out the policy payable to himself. The amount was to be paid upon his death. He had a right to direct to whom it should be paid. Insurance policies other than those payable before death, are ordinarily taken out for the benefit of some third person or class of persons, and not as a mere investment for the benefit of creditors. It was in view of this supposed intention that our statute was enacted. Under this statute, as against the wife and children of the insured, or as against any other person, for whose use and benefit said insurance is declared in the policy, the

---

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

---

creditor cannot claim. Indeed, the statute, if its strict letter is to control, provides that the proceeds of any life policy shall "*in no case*" enure to the benefit of a creditor or creditors, unless the "policy declares that said insurance was effected for the benefit of such creditor or creditors." The policy being in favor of Streiber himself, he had a right to insert in the policy such a declaration. This he has done, and we think it is effective to entitle the parties to the proceeds.

So far as the matter of insolvency is concerned we do not think, under our statute, that it would make any difference if the premiums to be paid were reasonable in amount, looking to the condition in life of the assured and other circumstances, and there was no proof from which it could be presumed that the *actual purpose* had in view at the time of perfecting the contract of insurance was to divert the money from the payment of anticipated debts and in fraud of his creditors. In other words, we mean to say that upon the death of the insured, whether he be solvent or insolvent, the purpose of the statute is to protect the amount of a policy of insurance reasonable in its character from the claims of creditors, and to secure the amount realized therefrom to the beneficiary declared therein.

The rulings of the courts upon this subject are conflicting. See cases cited in May on Insurance, §391, note page 535 second edition. We are therefore to construe our statute according to the policy of the law, and the intent of the Legislature, and this policy and intent we think are fully carried out by here declaring that the amounts of these policies were not assets of the estate. A case arising apparently under a somewhat similar statute of our own is cited in May on Insurance, note to §§390-451, pages 583, 681, second edition, which we have been unable to examine. It is the case of Brossard vs. Masso-

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

nin, Supr. Court, (Montreal) 4 Ins. L. J., 395. See also Pullis vs. Robinson, 73 Mo., 201. The statute here construed will be found at length in the case of Pace vs. Pace, 19 Fla., 438, to which case also attention is called.

To hold that the proceeds of these policies were subject to the claims of creditors here would be in effect to say that the declaration here in the policies amounted to nothing.

Where such a declaration appears in the policy the presumption is that it was made when the policy was taken out or shortly thereafter. We cannot see why the written declaration in the policy here cannot be shown to be by the assured. The statute does not require the declaration to be signed, and we should not extend its requirements by construction. In this case Streiber spoke to Mrs. Barker of getting out the policies for these children, and she says that some time thereafter "he brought the policies home one evening, said he had got them and sat right down and put Hattie's name on one policy and Johnny's on the other." These policies were taken out in 1870, and it is not pretended that Streiber was indebted to any one until some years thereafter.

In this connection appellants insist that the defence set up by the defendant in his answer was an assignment of these policies, and that under such an answer he cannot make this testimony available to show any other defence. We cannot see that these pleadings are as stated.

Plaintiffs allege in their bill that defendant has received and collected considerable amounts due on policies of insurance on the life of said testator by the Continental Life Insurance Company of New York. Other statements of the plaintiffs of the bill may be construed to be an allegation that such money was assets of the estate. In the interrogating part of the bill the plaintiffs simply ask whether de-

---

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

---

fendant has not collected money due “on insurance policies on the life of William R. Streiber, and if so what amount and when received, and what disposition has been made of it?” Defendant in his answer “denies that the sums of money payable on these policies of insurance constitute assets of the estate, and avers that during the lifetime of said Streiber, and before his last illness, he assigned and transferred said policies in said complainants’ bill mentioned Hattie Barker and John Barker, and the same have been collected by their guardian and is held by him for their use and benefit.” It thus appears that the responses of the answer were as broad as the allegations of the bill and the interrogatory covering the general subject. The true issue here was assets or no assets. Plaintiffs filed no exception to the answer, but filed their replication thereto, thus admitting its sufficiency. The simple denial that these moneys were assets and a statement setting up their payment to the guardian of these children as their property met the case. The rule in such cases is that “where the facts were put in issue and proved a defence will be allowed, although it is not distinctly raised on the pleadings.” A simple allegation that certain moneys are assets is certainly answered by a denial that they are assets, and affirming that they were the property of other persons named. The allegation that the policy was payable to the insured is, under the pleadings, admitted by the defendant. The question of assets was the issue, and we do not think the defendant here, in view of the pleading of the plaintiffs, should fail simply because the mode and method in which the fact of no assets was to be proved was not elaborately set forth or an assignment was alleged, when the facts failed to show a delivery of the chose in action, but did show a declaration in writing which is something less than an assignment or gift to take effect *in presenti*.



---

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

---

The second ground of plaintiffs' appeal is "because the said referee found and decreed that the estate of said Streiber was entitled to a credit of eighteen hundred dollars for salary earned and due said Streiber for services rendered Eppinger, Russell & Co. for the year ending April 1st, 1874."

It appears that Streiber, prior to April, 1873, was receiving a salary of \$1,800, as bookkeeper, from Eppinger, Russell & Co., plaintiffs, and the referee allowed that sum as salary for the year 1874. There is no doubt of the performance of the service, nor is it claimed that the allowance is excessive, but it is insisted that during that time Streiber was a member of the firm of Eppinger, Russell & Co., with an interest of one-sixth in the profits during the year 1873; that the firm sustained heavy losses for that year, and that Streiber was for that reason not entitled to the salary. The plaintiffs admit that he was entitled to a salary after that year. The question, therefore, upon which this matter depends is, was Streiber a member of the firm of Eppinger, Russell & Co. for that year. Russell, one of the plaintiffs, swears that such a relation existed. As a matter of course no relation of partnership could have existed between these parties except as the result of a "transaction or communication" between them, and therefore neither he nor any of the plaintiffs are competent under the statute (Chap. 1983, Laws) to prove a partnership relation between themselves and Streiber in a suit by them against his executor. There is no evidence in the books of the firm showing any such fact.

It can serve no good purpose to encumber this opinion with a statement of the testimony of the witnesses examined by the parties upon this subject. I have read it over and analyzed it carefully and thoroughly, and cannot say or demonstrate that the finding of the referee is wrong.

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

The testimony of Moody, who was a member of the firm to 1873, and who employed Streiber originally, is that conversed with the partners, as well as with Streiber, on subject. He swears definitely as to the time, and for his testimony, which we cannot say is overthrown, though it is not consistent with that of plaintiffs' witnesses it is clear that while the subject was discussed, yet there never was a consummated agreement for a copartnership. We know of no rule of law which authorizes us in this conflict to direct the master to believe plaintiffs' witnesses rather than defendant's.

The third and last exception, the overruling of which the referee the plaintiffs make a ground of their appeal here, is the allowance to the executor of the sums paid Mr. McDonald and James M. Baker for professional services rendered as attorneys at law to the executor. The ground upon which these charges are objected to is that where the administrator acts in such disregard of duty as is disclosed by this record he should not have credit for counsel fees. This may be good ground for the administration of some persons in the way of not allowing compensation to the administrator, but we cannot see why one account for money expended rather than another should be disallowed on this account. The amount of the charge of the attorney is certainly no standard by which the loss occasioned by neglect to follow the advice given or failure to discharge any of duties as executor is to be measured. I do not understand that it is denied that the service was performed or that compensation is reasonable and proper in amount. It should be allowed. *McHardy vs. McHardy*, 7 Fla., 317; 3 Williams on Executors, 6 Am. Ed., 1971, note K.

What has been said disposes of the matters involved in the appeal of plaintiffs, so far as insisted upon here.

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

remaining matters to be disposed of are the exceptions of the defendant to the findings of the referee, which the referee overruled, and which are set up as grounds of appeal upon the appeal of the defendant.

The first ground of exception is that the master has charged the defendant with the rent of the real estate for the entire time since the death of testator. There is no objection made to the sum charged as rent, if he is chargeable at all. The rents of this property are a fund to which the creditors have a right to look for the payment of their debt. *Gilchrist vs. Filyau and wife*, 2 Fla., 97; *Sanchez vs. Hart*, 17 Fla., 507. And if the administrator neglects to discharge his duty in this respect, unquestionably, to the extent that they are necessary to meet their claims, he should be charged at the suit of the creditors. There is no pretence here that the personal property is adequate to pay the debts.

There were two houses belonging to the estate, one large the other small. The executor says he endeavored to rent the large house the first and second years after the death of the testator. Upon cross-examination he names two persons to whom he spoke on the subject. He never advertised the house for rent. He admits that the Barker family claimed the property under the will, and that with his consent they entered into possession shortly after the death of Streiber, and that he never even demanded any rent from them. The small house he rented for a portion of the time at eight dollars per month. The furniture in the large house, which was the residence of the testator, he permitted to remain, subject to the use of the Barker family. The Barker family after moving out of their house, rented it at the rate of ten dollars per month for a sufficient length of time to realize almost two hundred dollars, and it was "never empty" for a year at a time. This house thus rented

---

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

---

was no better than, if it was as good, as the large house belonging to the estate. The charge made was five dollars per month for the large house, and to this the executor accepts. We must sustain the action of the referee here. That the small and inferior house in the yard was rented at eight dollars per month, and that the Barker house was rented at ten dollars per month, and was at no time occupied for a year, are facts which are not explained or answered by the simple statement of the executor, that he endeavored to rent the house. The only difference here, which the failure to rent the one house while the others were rented can be reasonably attributed, is the fact that the executor permitted the family to occupy it without rent, and the reasonable explanation of the conduct of the executor here, looking to this entire record is, that he did not feel that he was responsible for the rent or should collect rent from the family, as the property, under the will, went to the family. This is no legal excuse. The claim that the family was subordinate to the creditor. He has clearly failed to act with reference to this fact, and failed to exercise the diligence required in the matter of the collection of these rents. Perry on Trusts, 527. The charge is proper, but as it is for money not received, it should be only simple interest.

The second exception is to the charge by the master of interest upon the sums in the hands of the executor with annual rests from the time of reception. This is a mistake. The master charged interest upon the yearly balances, the rule in this State requires. He did not charge interest upon the sums as received. The fact that the executor permitted the funds to remain in the bank uninvested makes no difference. Where the executor retains the money, as it does not appear affirmatively that "no good security could be found on which to put out the said money at interest

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

and he fails to pay it into court, pending the litigation, he is chargeable with interest. *Shepard's Heirs vs. Shepard's Administrator*, 19 Fla., 341; *Perry on Trusts*, 3 Ed., Sec. 468, and cases cited to note 4. It enters into his yearly balances and the interest upon the balance found at the beginning of a year is to be carried into the balance struck at its close, computing interest for the next year upon the whole, no interest being computed upon the sums, when received. *Sanderson vs. Sanderson's Administrators*, 17 Fla., 862; *Moore and Montford vs. Felkel*, 7 Fla., pp. 54, 60.

The third exception is because the master has not allowed the executor any compensation for his services.

We cannot see how the executor here can expect to be paid anything when he has so signally failed to discharge his duty. The moneys of the estate which he collected he allowed to remain idle, while admitted claims against the estate are bearing interest. He files no annual returns in the county court as required by law. The personal property, which is of perishable nature, he fails to dispose of. The real estate is so managed as to yield but little income. It is not even kept in as good repair and condition as when it came into his possession. The compensation of an executor is in this State regulated by statute. When he renders annual returns as required by law he is entitled to a commission on accounts collected and disbursed, and approved and allowed. He is also entitled to a fair and just compensation for his services. *Shepard's Heirs vs. Shepard's Administrators*, 19 Fla., pp. 331, 332. Here the executor has failed to make annual returns, and we do not think his general administration of the effects of the estate is of such character as to entitle him to compensation.

Defendant's fourth, fifth, sixth, seventh and eighth exceptions all refer to the Eppinger, Russell & Co. account.

---

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

---

This account has been the subject of examination by reference to the books of the firm by both the master and the referee. The referee states in his report that he has "carefully examined this account as proven, and the book from which it was taken, and it is found to be exactly in accordance with the same account in Streiber's own handwriting, in the book of Eppinger, Russell & Co." There is nothing here showing this finding to be incorrect.

The last and ninth exception is to the allowance of the accounts of Doctors Sabel and Kenworthy. These accounts as the referee finds were admitted before the master without opposition. He states that they were not objected to.

The findings of the referee in this case are therefore sustained. None of the causes specially set forth by the parties to the two appeals herein as grounds for reversal of the decree are well taken. No objection for want of parties urged by either plaintiffs or defendant.

There is, however, manifest error in the decree here rendered. It should not have been against the executor for the amount of the valuation of the property in his hands. The decree here should be for sale of all the effects of the estate, both real and personal, except for the moneys admitted to be on hand. This should be decreed to be brought into court, and the proceeds of the sale, as well as the moneys, should be directed to be applied to the payment of the debts according to their admitted priorities. To the extent that there are sums found due from the executor for rents which he did not collect, and for the interest on the moneys in his hands, or other sums from which he did not realize anything, but should have realized something to that extent should the decree direct an execution to issue to be levied of the goods and chattels of the executor, in the event such amounts are necessary to satisfy the creditors. The land, the goods and chattels, and the mon-

---

Eppinger, Russell & Co. et al., v. Canepa, Ex.—Opinion of Court.

---

on hand admitted to be the property of the estate, are to be treated as assets in the hands of the executor, and applied to the claims of creditors.

There has been here no conversion or misapplication of the property proved. The Barkers are in possession as they admit simply as agents of the executor to take care of the property, and the funds the executor admits are assets and have not been converted. The prayer of the bill here is not for a personal decree as for a *devastavit*, but for a sale and application of the property, real and personal, to the claims of creditors. This is the ordinary case of a bill by creditors seeking sale of assets and application of proceeds to the payment of their debts. Story's Eq. Jur., §546 *et seq.*, to 570; Thompson *et al.*, vs. Brown, Fay *et al.*, 4 John. Chy., 619.

In framing the decree it should embody in itself the amounts due. It should not be simply for a sum to be ascertained by reference to a master's report. It should set out the amount in dollars and cents, as in the case of a judgment at law. The case cited from 4th Johnson's Chy. contains a form of decree, which, so far as applicable under our statutes, may be properly followed. Indeed, this case gives quite fully the practice in a creditor's bill to administer assets.

Insolvency is not a necessary element to give equitable jurisdiction in such cases, and therefore the discussion of the question, whether the estate is insolvent, is unnecessary.

The decree is reversed and the case will be remanded with directions to reform the decree in the respects indicated in this opinion, and for further proceedings in execution of the decree. Plaintiffs and defendants will each pay one half of the costs.

---

---

Sanderson's Administrators v. Sanderson—Syllabus.

---

---

MARION AND MARY A. S. SANDERSON, APPELLANTS,  
SANDERSON'S ADMINISTRATORS, APPELLEES.

SANDERSON'S ADMINISTRATORS, APPELLANTS, VS. MARION  
AND MARY A. S. SANDERSON, APPELLEES.

1. It is too late upon a second appeal, after hearing upon a former appeal and remanding the case, to object that an original protest of a note and certificate of a Notary are not evidence of the facts which they narrate, no such objection having been made and insisted upon at the time of their introduction in evidence.
2. Where the indorser of a promissory note resides in a different place from the point at which it is payable, notice of the default of the maker must be deposited in the post-office in time to be sent by the mail of the day succeeding the day of the dishonor of the note, provided the mail of that day be not closed at an unreasonably early hour, or before early and convenient business hours, in which case it must be sent by the next mail thereafter. Where the notice is not mailed until the second day after the dishonor of the note, and no circumstance which would extend the time is shown, it is not sufficient to bind the indorser.
3. If there has not been any due presentment and notice of dishonor of a note, and the indorser, after the maturity of the note supposing himself liable to pay it, takes security therefor from the maker, that will not alone amount to a waiver of the objection to the want of due presentment and due notice. The presumption there is that he takes the security merely as contingent security in case of his liability, but if the evidence is of such character as to show an admission of unconditional liability, and that evidence consists of such an admission to one who afterwards became the administrator of the indorser, and other circumstances, the amount of the claim so paid by the administrator should not be charged against him as a *deceit*.
4. An administrator, under the statute, is a competent witness to declarations and admissions of the deceased intestate as to claims against him.
5. One of two partners, as attorneys at law, has a right to share in sums realized by the other as commissions for sales of stock in a railroad company where such sales are embraced in the ordinary



---

---

Sanderson's Administrators v. Sanderson—Syllabus.

---

---

usages and customs of the business of an attorney at law in the locality where it was carried on.

6. Where an administrator pays a tax to which the estate is subject, he is not to be charged as for *devastavit* on the ground that there may be some technical defect in the entry of the assessment or otherwise. Where there is an unauthorized investment of funds of the estate by the administrator, the equitable title of the distributee and the legal title of the administrator continues until the rejection of the investment by the distributee, and such investments are subject to taxation as the property of the estate until rejected.
7. Where the administrator was the partner of the deceased intestate and has in his possession, as such surviving partner, funds collected as attorney, which are claimed by others, but in which he thinks the intestate had rights, and he is in doubt as to the party entitled, and the party on whose account the collection was made will not instruct him how to apply the money, it is proper for him to file a bill of interpleader, and when he produces the money and pays it into the court under an order of court, subject to the litigation, he is not chargeable with the sum until it is received, or may be obtained by him from the court, in the event the estate is held entitled to it.
8. Exceptions to a master's report, taken after the entry of an appeal from the order made by the court upon the report, cannot be heard.
9. The person subsequently appointed administrator of the deceased intestate finds a considerable cash deposit in a bank to the credit of the deceased. He makes a contract with the bank by which the estate was to receive interest thereon. He is properly chargeable with the sums, principal and interest, which he received under the contract.
10. The amount fixed by the Chancellor for compensation to an administrator for his services after evidence and hearing will not be disturbed in a case where this court can see no error in the sum allowed. An additional *annual* allowance for services, however, cannot be made.
11. That an administrator has made investments not authorized by the statute is no ground upon which to deny him compensation for his general services in a case where there is no loss to the estate by such investments and the administrator settles in accordance with the law controlling the matter of unauthorized investments,

---

**Sanderson's Administrators v. Sanderson—Syllabus.**

---

12. The forfeiture incident to a simple failure of an administrator to file his returns and have them allowed and approved as required by law extends only to his commission on amounts collected or disbursed. If the annual account of an administrator is placed in the hands of the Judge of the County Court at the time required by law, his failure to place a file mark on it does not result in a loss of commissions by the administrator. The Judge of the County Court should mark the account and vouchers filed, whether he approves them or not. If the return is not made as required by law, the administrator is entitled to no commissions. The first annual return of an administrator should embrace a period of one year commencing from the date of his letters of administration. A return is not required to be filed by the first day of June, unless between that date and the letters of administration a year has elapsed.
13. The exercise of discretion by the Chancellor in fixing the allowance by way of compensation and commissions to an administrator when within the limits fixed by law will not be disturbed by this court except where it clearly appears that the allowance is too much or not enough.
14. The surviving member of a firm uses an account of the firm, supposed to have accrued before the death of the deceased partner, against one of their clients in a transaction with such client by which he, the survivor, makes the claim available and uses it. Upon an accounting between the heirs and distributees the surviving partner is properly chargeable with such claim as an asset of the firm, notwithstanding the party allowing the claim swears no such sum was due. This in a case where the party thus settling the account waived, at the time, all right he may have had to recover the amount from the firm or any member thereof.
15. A surviving partner cannot object that interest upon a balance found due by him upon an accounting before a master between him and the heirs and distributees of the deceased partner, is allowed from the date the amount is ascertained, and the balance struck by the master.
16. Where the conclusion from the testimony is that an administrator could have readily collected a balance due the estate upon a judgment with the use of that reasonable diligence and care that a prudent man exercised in his own affairs, the administrator should be charged with it. *Shepard's Heirs vs. Shepard's Administrator*, 19 Fla., 300, cited and approved.

---

**Sanderson's Administrators v. Sanderson—Syllabus.**

---

17. The administrator set up as a ground of appeal, that he is charged "compound interest on money not actually reduced to possession," and fails to show any particular item or charge in which this has been done. It is not the duty of this court to look through several volumes of a record in search for illegal charges of any kind for either party, when they are not pointed out. Such grounds of appeal are to be regarded as "frivolous."
18. Because there is no guardian of an infant appointed is no reason why funds in the hands of an administrator in which she has an interest is not to bear interest under the statute during the administration.
19. An exception to the effect that there is error in the balance found against the defendant, and on the final accounting, no items being mentioned, is frivolous.
20. Upon a previous appeal in the judgment of this court there was assessed as costs the sum of \$20.75 for a "certified copy of the opinion to the Circuit Court." A sum paid by either of the parties for an additional copy of the opinion for their use, is not properly chargeable in the costs of the suit.
21. Costs incurred in the Circuit Court after the entry of the appeal, such as a charge for certified copy of the record of the decree appealed from, are taxable in this court and not in the Circuit Court.
22. A demurrer interposed in the Circuit Court is overruled. There is no question of the equity of the bill. Upon appeal this court discovers that an infant plaintiff was not properly before the court; that the widow of the deceased intestate was suing in a right which did not exist, and had omitted to make certain allegations. Upon remanding the cause this court directed that an amendment be allowed. The defendant as to costs under these circumstances should stand in no better position than if he had set up the grounds in his demurrer, and the court should have sustained his demurrer. Costs of the amendment and no more should have been allowed. This was the extent of the additional cost incurred and no more under the usual practice was permissible.
23. Where the suit is by distributees for an account at the hands of the administrator, who is also a debtor to the estate as surviving partner in a partnership of which the deceased intestate was the other member, and the distributees in said suit claim and re-

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

cover a balance against him as surviving partner, neither the estate nor the interest of any distributee should be charged with any costs incurred in connection with the accounting as surviving partner, where the claim is resisted by the surviving partner after a failure by him to render an account of partnership transactions. Here the surviving partner has no claim to costs, either as between party and party or as between attorney and client. As to the matter of the suit for distribution notwithstanding the disallowance of some of the claims of the administrator, and notwithstanding the fact that upon an accounting he is found indebted to the distributees, he is entitled to his costs as between party and party, and also to any reasonable charge which he has incurred for attorney's fees, in the matter of his accounting and settlement as administrator in a case where he has acted in good faith without fraud, and his administration is followed by a full and fair settlement, and where from the position assumed by the distributees he was forced to submit to litigation in order to arrive at any fair settlement.

24. An adult distributee is not responsible for all the costs incurred in a suit for the settlement of an estate in which a minor is a co-distributee. If not paid from the estate a portion of the costs would go against the next friend. Here a proportionate share should be charged against the part of the funds coming to the infant, as the suit is in good faith and for her interest by the next friend.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

*H. Bisbee, Jr.*, for Marion and Mary A. S. Sanderson.

*Fleming & Daniel* and *John T. Walker* for the Administrators.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This case is here upon appeals by plaintiffs and defendants from the action of the Circuit Court had subsequent to a determination of a prior appeal by each of the parties.

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

and the remanding of the cause. A full statement of the case, and the action of this court upon those appeals up to the remanding of the cause, will be found in a previous volume of the reports of the decisions of this court. Sanderson's Admr's. vs. Marion H. Sanderson, 17 Fla., 820; and it is not deemed necessary here to encumber the reports with a second statement. After this case was remanded the parties entered into the following agreement:

*First.* That the testimony taken before the master, J. H. Durkee, with exhibits, shall be admitted for the purpose of the further hearing, reserving to the complainants the right to insist on the law of *res adjudicata* as to all of the accounts or any part thereof, and to the defendants the right to introduce new and further testimony as to any of the issues of fact involved. It being understood, however, that in case the defendants introduce new testimony, the complainants shall have the right to introduce testimony on their part in rebuttal.

*Second.* This head of the agreement refers to the method of general accounting and does not concern the exceptions brought here upon these appeals.

*Third.* The complainants agree not to dispute, but will admit all credits claimed by defendant, L'Engle, in his accounts as administrator paid on account of said estate, excepting only the Baxter claim, and such as arise from the investments of the assets of said estate other than those which have been accepted by the complainant, Marion H. Sanderson, on account of her distributive interest in said estate, except also any matter of law which may arise upon the voucher \$2,064.00 paid to R. S. Grant & Co. or R. S. Grant.

*Fourth.* The following points are designated for further examination before the master:

1st. The Ambler interest account.

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

2d. The allowance to the administrators severally for an on account of the administration of said estate.

3d. The attorney's fees paid and to be paid by the administrators and each of them.

4th. The costs and disbursements of every kind in this suit.

5th. The item on partnership account of \$4,166.66, entered as June 30, 1871, appearing on page 75 of Exhibit No. 43, as reported by the master, J. H. Durkee.

6th. The question of commissions received by John F. Sanderson for the sale of Tallahassee Railroad stock belonging to Call, Baker and Niblack in relation to the rule laid down by the Supreme Court.

*Fifth.* Errors and omissions of fact, when discovered and pointed out by either party, shall be subject to correction.

*Sixth.* Notwithstanding the foregoing points of agreement each party reserves the right to urge any and all matters of law which may be necessary to the proper presentation of the case.

An examination of the opinion rendered upon the previous appeals in this case will show that many of the matters therein considered, and determined with reference to the record then before this court are under this agreement made the subject of rehearing and re-investigation by the Circuit Court and are now here to be re-investigated by us. This objection has been made here by neither of the parties and silence by all of them was the response to repeated questions by the court calling their attention to the matter. We shall, therefore, treat this agreement as the rule determining the extent to which these second appeals bring the various questions discussed to our attention. Upon the general subject of the extent to which a case is to be reviewed upon a second appeal or writ of error, see *Tyler vs*

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

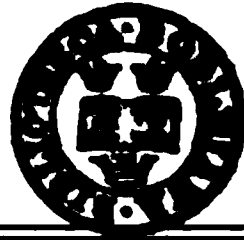
---

Magwire, 17 Wall., 283; Roberts vs. Cooper, 20 How., 481; Corning vs. Troy Iron Factory, 15 ib., 466; Ex parte Sibbald, 12 Pet., 492; Martin vs. Hunter's Lessees, 1 Wheat., 355; Himly vs. Rose, 5 Cranch., 317; Roemer vs. Simon *et al.*, 91 U. S., 149; Russell vs. Southard, 12 How., 159; Carter vs. The American and Ocean Insurance Company, 3 Pet., 319. The principles clearly announced in these cases may not perhaps be applicable to the present case, because, as we said in the preceding appeals, the strict rule required their dismissal without prejudice, and the infant not being a party or concluded thereby, was expressly given the right to introduce new testimony upon all subjects and to contest all matters involved therein. The right in which the widow sued also was of such character as gave her no equity. She sued as heir when her only claim was as widow electing a child's part. We accept, therefore, this agreement as the law of the case to the extent that the subsequent proceedings come within its terms.

We first consider the several grounds upon which a reversal of the decree is sought by the plaintiffs in the Circuit Court, the widow and child of John P. Sanderson.

The first ground of appeal by plaintiffs is because the Circuit Court allowed a credit of four hundred and fifty-three dollars and fifty-five cents, amount paid in settlement of the Baxter claim.

By reference to the opinion rendered upon the former appeal it will be seen that the court allowed an exception to the credit for this sum, not because it appeared that nothing was done, but because the testimony did not establish "that the amount paid was due." In other words, it was too indefinite to fix the amount of the debt due. The testimony upon which the plaintiffs now insist in their argument that nothing is shown to be due the Baxter estate was that taken before the mandate in the first appeal, and



---

*Sanderson's Administrators v. Sanderson—Opinion of Court.*

---

which was then considered. We shall not review our conclusion as to the result of that testimony. By reference to the opinion it will be seen that our conclusion was that it did appear that something was due but that the amount paid was due was not then established. We are entirely satisfied that that conclusion was correct. The question here now is, does the new testimony, together with that here upon the first appeal, establish the amount due to be as much or more than was paid. We think the testimony of J. J. Daniel does establish that the sum paid was due. He states substantially that after an examination of the whole matter with the papers and other proofs of the claim and its amount, he "was thoroughly satisfied" that the sum was due. In this examination "the memoranda prepared during the latter month of Colonel Sanderson's life in a partial settlement made between him and parties representing the Baxter estate," to which much of the testimony upon the previous hearing was directed, was before him. The papers then before him and from which he came to this conclusion, he states he has made diligent search and inquiry for and cannot find. Mr. Bell, who represented the Baxter claim in the negotiations, and who this witness states it is probable has possession of the memoranda referred to, the witness understands lives in Texas, but where he resides or how to reach him the witness does not know. We see no legal objection to this testimony. The plaintiffs urge none. It is the positive statement of the knowledge of a party having no interest in the claim itself, and whether if he had any interest or duty in the premises, it was against the admission of any debt, as he represented the estate as an attorney at law in the settlement. For the reasons stated we think the voucher under the agreement to introduce new testimony was properly allowed.

The second ground of appeal by plaintiffs is because the



---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

court allowed the administrator credit for \$2,064 paid by him May 30, 1874, on account of the "alleged liability" of Sanderson as an indorser of a promissory note made by the Florida, Atlantic and Gulf Central Railroad Company, September 20, 1860, payable five months after date. The ground of objection is "that there is no evidence whatever that Sanderson had notice of the protest of this note, and that therefore he never became liable as endorser."

The note is as follows:

**\$2,064.**                                      NEW YORK, September 20, 1860.

Five months after date the Florida, Atlantic and Gulf Central Railroad Company promise to pay J. P. Sanderson or order at the office of Joseph Gun, 94 Wall Street, New York, two thousand and sixty-four dollars for value received, and have pledged three thousand dollars of the Freeland bonds of said company to secure the payment of this note at maturity, numbered as follows: Nos. 1, 2, 3, and 4 of \$250 each, and numbers 129 and 130 of \$500 each, and numbers 101 to 110, inclusive, of \$100 each. Total, \$3,000. To be surrendered on payment of this note.

FLORIDA, ATLANTIC & GULF C. R. R. Co.,

By J. P. SANDERSON, President.

The note is endorsed in blank: "J. P. Sanderson."

The legal presumption is that such an endorsement was made before the note was due. This we do not understand to be denied. Before the master upon the first reference and before the first appeal herein the original protest and certificate of notice thereof were placed in evidence without objection by plaintiffs. The protest is in proper form, and while it is without date, the Notary recites that on the 23d of February, A. D. 1861, he did present the original note at the office at which it was payable and demanded payment, which was refused. Following the protest is a certificate of the Notary, who states that on the 25th of February, A.

---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

D. 1861, due notice of the protest was served upon the endorser by depositing the same in the post-office in the City of New York, and prepaying postage thereon, said notice being addressed, J. P. Sanderson, Jacksonville, Florida.

E. M. L'Engle, the administrator, says in his testimony that he "had knowledge of the debt against J. P. Sanderson, from conversations with him, during his last illness, in which conversation he sought to make me acquainted with the general condition of his affairs. He told me of this note endorsed by him and acknowledged it as a claim against him. He spoke of the bonds which were hypothecated with the note, (Freeland bonds,) and of other bonds of the same class which had been hypothecated with one Davis in North Carolina by the Florida, Atlantic and Gulf Central R. R. Company for a debt due said Davis by the company, and which, the debt being paid, Davis had returned to him, Sanderson. He said that said bonds so returned were in his safe, and that he meant to hold on to them for his protection, which bonds so in his safe, together with the bonds which were hypothecated with said note I, as administrator, filed with James M. Baker, Master in Chancery in the suit of L. I. Fleming and Green H. Hunter, Trustees against the Florida, Atlantic and Gulf Central Railroad Company, to close the trust concerning all the bonds of that class. The bonds so filed by me are still with James M. Baker."

When exhibit C, which was the original protest and certificate before alluded to, and a copy of the note was originally introduced in evidence before the first appeal, L'Engle in his testimony stated that "the demand was presented for payment in the early part of February, 1872. The demand was made in writing by letters addressed to me which I here produce and offer in evidence, contained in seven sheets of paper." Plaintiffs' attorney objected to the introduc-

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

tion of the papers because, as he contended, they constituted "no evidence of legal presentation of the claim referred to therein against the estate of John P. Sanderson," and also "for want of proof of their authenticity." L'Engle, after stating that Sanderson, during his last illness, sought to make him acquainted with such of his business affairs as were unsettled, says that Sanderson spoke to him about this note. The witness says: "This debt was one of the matters he talked to me about. I endeavored to effect a settlement of Sanderson's liability at a heavy discount. The negotiations extended through 1872 and 1873. I finally succeeded in effecting a compromise of the whole debt for the amount of the principal. The bonds mentioned in Mr. Grant's letters, as being placed with him as collateral security for the (\$2,064) two thousand and sixty-four dollar note were delivered to me as administrator by the holder of the note through Ambler's bank. Said bonds were by me filed with James M. Baker, Master in Chancery, appointed in a proceeding instituted to close the trust under which said bonds were issued. They were filed that the estate might receive its distributive share from these bonds." The letters, to which allusion is here made, are in the record, but beyond the fact that they show confidence in the liability and solvency of the estate, it is not seen that they have any bearing upon the question raised as to this payment upon this appeal.

The note, protest and certificate must be treated as properly in evidence here, and must be given the same effect as they would be entitled to if they were accompanied by the deposition of the notary. *Nicholls vs. Webb*, 8 Wheat., 332; *Spann vs. Baltzell*, 1 Fla., 322.

No such objection was taken to them when introduced upon the first appeal, and it is too late now to urge the ground that an original protest and certificate are not evi-

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

dence of the facts which they narrate. It appears here therefore, that this note was presented for payment and payment demanded and protest made on the 23d of February, A. D. 1861, and that notice of such demand and dishonor was mailed to Sanderson, the indorser, on the 25th of February, A. D. 1861. The question which the plaintiffs raise here now, is whether upon these facts, the indorser, Sanderson, was bound, and this is a question of law which under the third stipulation of the agreement, they have a clear right to raise and insist upon. The indorser here resided in Jacksonville. The note was payable in New York City.

Chief-Justice Marshall, in *Lenox vs. Roberts*, 2 Wheaton 373, says it is the opinion of the court that notice of the default of the maker should be put into the postoffice early enough to be sent by the mail of the day succeeding the last day of grace. In the case of the *Bank of Alexandria vs. Swann*, 9 Pet., 33, Mr. Justice Thompson approved of the general rule announced in *Lenox vs. Roberts*. The same rule was adopted by Mr. Justice Washington in the case of the *United States vs. Parker's Admr's.*, 4 Wash. 465, and that decision was affirmed on error by the Supreme Court in 12 Wheat., 559.

It is unnecessary to repeat authorities to this general proposition. The rule where the indorser resides in another State or place is, that the notice must be deposited in the postoffice in time to be sent by the mail of the day succeeding the day of the dishonor provided the mail of that day be not closed at an unreasonably early hour or before early and convenient business hours in which case it must be sent by the next mail thereafter. "In other words," as remarked by Mr. Daniel, "the notice must be sent by the first mail which leaves after the day of dishonor is past and does not close before early and convenient busi-

---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

ness hours of the day succeeding the day of dishonor." See the case of *Lawrence vs. Farmer's Bank*, 1 Ohio State, 206, a case which this able text writer justly calls "a most learned and instructive case on the subject of notice."

In this case the notice was not mailed until the second day after the dishonor of the note. No circumstance extending the time to that day is shown. The notice therefore was not sufficient to bind the indorser.

It is insisted, however, that the indorser here received security and indemnity of such character and from such party as excuses notice by the holder of the demand and dishonor. We do not think that the facts of this case call for a discussion of this doctrine. As indorser, Sanderson had nothing in his hands to secure him against his contract as indorser. The bonds which went to the holder of the note, his indorsee, were for his, the holder's, security. They were not in the possession of Sanderson to secure him as indorser, and L'Engle, Sanderson's administrator, received them from the agent of the holder, when he paid the principal of the note. The bonds were received by L'Engle, the administrator, after maturity of the note and its dishonor and after Sanderson's death. The indorser here never did have them as security for his contract as indorser. As to the other bonds of which the indorser spoke in his conversation with L'Engle the time or circumstances under which he, Sanderson, received them, so far as disclosed, would give him no right by virtue of any contract shown, to hold them as indemnity. He states that they were hypothecated "with one Davis, in North Carolina, by the Florida, Atlantic and Gulf Central Railroad Company for a debt due said Davis by the company, and which (the debt) being paid, Davis had returned to him, Sanderson. He said that said bonds so returned were in his safe and that he meant to hold on to them for his protection." This

---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

does not prove any possession of these bonds by Sanderson under a contract made with him as indorser by any party to secure him. In his last illness he simply states that these bonds are in his safe. He received them from Davis when the company paid Davis what it owed him. Sanderson had possession of the bonds, and affirmed that he would hold them for his protection, and we think the presumption here is that Sanderson received these bonds after the dishonor of the note by virtue of some understanding with the company. What that understanding was, however, as far as it affected the nature of the liability of Sanderson is concerned, is not disclosed. The rule as stated by Mr. Justice Story upon this subject is that "if there has not been any due presentment and notice of dishonor of the note and the indorser, after the maturing of the note, supposing himself liable to pay the same, takes security therefor from the maker, that will not alone amount to a waiver of the objection of the want of due presentment and due notice, since it cannot justly be inferred that he means at all events to make himself liable for the payment of the note; but he takes the security merely as contingent security in case of his liability." Story on Promissory Notes, 278. Here there is no proof that Sanderson took these bonds under any contract with the maker of the note, and so far as the act of Sanderson's administrator was concerned he simply received the bonds from the holder of the note (Sanderson's indorsee) when he, the administrator, paid the note. See also upon this subject 2 Daniel Negotiable Instruments, second edition, pages 164, 165, 166, 167, 168.

If, however, it be true that the Davis bonds were placed in Sanderson's hands under a contract of indemnity with the company before the note became due, after indorsement and before dishonor, the simple fact of receiving such security unaccompanied by other circumstances which indicate an

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

intention of the indorser to dispense with demand and notice would not excuse notice. An indorser's contract is one of contingent liability. To make it absolute the circumstances must show such to be the intention and the taking of security as shown in this case is not sufficient to change the nature of the liability from conditional to absolute. *Kramer vs. Sandford*, 4 Watts & Sargeant, 328. Where, however, it is distinctly shown that the indorser, with knowledge of the facts attending the protest and notice, and with knowledge as in this case that he had received no sufficient notice to bind him as indorser, takes a security, "it is a circumstance of evidence to show a waiver of objection, though not conclusive or perhaps even presumptive proof of that fact." 2 Daniel Negotiable Instruments, 166. For, as remarked by an able text writer, (1 Parson's N. & B., 619) "why should a person take these steps to secure himself unless his liability actually existed." This brings us to the consideration of the proposition of the administrator here that Sanderson acknowledged the debt, and with a full knowledge of all the facts directed its payment as his debt, and did such acts as amount to a waiver of the objection that the proper steps had not been taken to bind him as indorser. We cannot presume that an attorney connected with such varied and important commercial transactions as this record shows Sanderson was, was not aware that under the law the notice here was insufficient to bind him. But whether he knew this to be the law or not is not material. He received the protest and notice and had actual knowledge of the facts concerning them. Want of actual knowledge of the law in this as in many other cases is no excuse. Whether he knew that this fact constituted a legal defence to the note is not material. *Third National Bank of Boston vs. Ashworth et al.*, 105 Mass., 503; *Hughes vs. Bowen*, 15 Iowa, 446; *Richter vs. Selin*, 8

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

Sergt. & Rawle, 425; Kennon vs. McRae, 7 Port., 17. Tibbets vs. Dowd, 23 Wend., 386. We think that the admissions and directions of Sanderson to L'Engle in respect to this note are inconsistent with any other theory than that Sanderson acknowledged that he was legally bound to pay the note. He spoke of it as a debt and gave directions which are consistent only with an admitted liability, and that liability could not have been such as resulted from notice of demand and dishonor. He knew the facts as to the nature of the demand and the character of notice he received, and was chargeable with knowledge that the law applicable to such facts was that he was excused. He had full knowledge of the laches. This admission and direction to L'Engle was made, too, under circumstances of more than usual solemnity. It was during Sanderson's "last illness." "This debt was one of the matters he talked me about," says L'Engle in his first examination, and at the examination since the case was remanded, he said "that Sanderson acknowledged it as a claim against him and advised him, L'Engle, that he (Sanderson) held certain bonds for his protection. The cases upon this subject are collected in 2 Daniel on Negotiable Instruments, pages 187 and 188. These acts and declarations to L'Engle were of such character as to show that Sanderson admitted liability here, and we think the law justified his action upon such declarations and acts. Certainly as to L'Engle any party claiming through Sanderson should be estopped from denying the liability which Sanderson admitted to him. It may be insisted that there is here no direct evidence of any admission of liability or promise to pay to the holder of this note by Sanderson. This is true. But the admissions to L'Engle are only consistent with such an admitted liability to such holder. If it is established that Sanderson during his lifetime admitted his liability for



---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

this claim to the person who became subsequently his administrator, we think the administrator is not called upon to resist it, for the necessary presumption is that the holder of the claim is entitled.

It is insisted that the length of time which elapsed during Sanderson's life should create a presumption of knowledge upon the part of the holder that some defect existed which would defeat a recovery. We must recollect that the war here intervened. And besides, the evidence when it relates to this subject shows that the delay to press Sanderson was occasioned by the expectation that he might in some way get the money from the railroad company. The holder seems to have acted under the impression that Sanderson "was a man of large means," and "he had no question but that it," (the claim) "could be collected by due course of law." The conclusion we reach here is, that the facts that Sanderson after the maturity of the note took security after his knowledge of want of due notice of demand and dishonor, and his admission and declaration after such knowledge, to L'Engle, who was then his partner and to whom he (Sanderson) was then giving directions generally as to his business and for the purpose of making L'Engle acquainted with the situation and nature of this claim, that the note was a debt for which he was liable, is sufficient to at least make a *prima facie* case of liability of the estate for this debt, upon which the administrator was authorized to act. What might be the case if the distributees here proved that Sanderson had done no act, nor made any agreement or promise to pay with his indorsee which waived want of notice of demand and dishonor which would negative such *prima facie* case (such, for instance, as evidence of the indorsee to that effect,) and that L'Engle could by reasonable diligence have ascertained this fact, we do not say. We

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

simply say, *prima facie* the administrator was not guilty—of a *devastavit* in paying this debt under the facts in evidence here. Sanderson's acts and declarations here show that he owed the debt and there is no doubt that L'Engle, under the statute, is a competent witness in this behalf. As to whether he ought to be, that is a matter of legislative discretion which we propose not to criticise.

It is not necessary in this case to decide the question, but we are inclined to the view that Sanderson here was not entitled to any notice; that he was so chargeable in law with knowledge of demand and dishonor that he was not entitled to notice. The demand for payment here was at the time and place appointed in the note and by a party entitled to payment. It was good against the company. Sanderson, here the indorser, was the representative of the company, and as its president drew the note. He was the president of the company when it became due. (We have not examined the record carefully as to this fact, as the decision is not controlled by our views based upon it). He was the payee of the note and was a director and a stockholder in the corporation. A corporation has only an artificial existence. Its acts, its knowledge, its responsibilities, the exercise of its powers and the discharge of its duties result from the acts and knowledge of its representatives, who are natural persons, and we think if the demand here was legal and proper, and of that there is no doubt, that Sanderson, by virtue of the relations stated, was chargeable with knowledge of demand and dishonor, and that that knowledge being derived from act of a party entitled to payment, excused any further notice of him. If Sanderson was chargeable with knowledge as such officer and representative of the corporation it would bind him individually as endorser. In the case of *Caunt vs. Thompson*, 62 Eng. Com. Law, 400, "at the trial, it was proved that the

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

bill was presented on the day it became due, at the house of the acceptor; and the defendant, to whom it was then shown, said that the acceptor was dead, and that he was his executor, adding a request that it might be allowed to stand for a few days, and he would see it paid." The executor was the drawer of the bill, and it was held "that there was sufficient evidence of notice of dishonor," and that "knowledge that the bill has been dishonored where the drawer is himself the party who is to pay the bill (as executor of the acceptor), amounts to notice." As a matter of course the knowledge in this case was derived from a person entitled to payment. So in the case now before the court, the demand was made by the agent of the indorsee of Sanderson, who had the right to demand payment of the company.

The third ground of appeal by plaintiffs, is because of the allowance of a charge against intestate, Sanderson, of \$1,200 in the account between him and respondent, E. M. L'Engle, as surviving partner of the firm of Sanderson & L'Engle, received by the intestate as commissions for the sale of stock of the Jacksonville, Pensacola and Mobile Railroad Company from Messrs. Call, Niblack and Baker.

When this case was here upon the former appeal we held that this sale of stocks was the business of a broker; that it did not belong to the ordinary business of attorneys at law, and that in the absence of proof of an express contract, making such sales a part of the business of the firm as attorneys, or that such acts were embraced in the ordinary usages and customs of this business in the locality where it was carried on, or that this transaction was one which the firm was employed to effect, or that the ordinary exigencies and objects of the partnership embraced sales of stock, L'Engle was not entitled to a share in the commissions paid. 17 Fla., 845. The matter is now presented

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

with additional testimony and it is insisted that the proof sustains the proposition that such a sale of stocks was embraced in the ordinary usages and customs of the business of attorneys at law in Jacksonville, Florida. The Judge of the Circuit Court so found. Some of the testimony here looks to cases of special contract where such sales are had through correspondence with a firm of attorneys. We do not think this reaches the question, because it is not contended here that Sanderson himself proposed to be acting as a member of the firm. No act of the firm is shown in connection with the matter. The proposition is that while Sanderson may not have supposed that his sale was as a member of the firm and therefore did not charge himself with it, still that it was an act like the preparing and filing an ordinary declaration, the compensation for which was enured to the partnership by virtue of the fact that the service was such as pertained to the business of attorneys at law, according to the ordinary usages and customs of their business in Jacksonville. We have read the testimony upon this subject carefully and the ruling of the court is certainly amply sustained by the evidence. Under the circumstances, however strange the fact that the ordinary business of an attorney embraces in the locality a simple sale of stock, an act which clearly belongs to the avocation of a broker, may appear to us, still, under the rules controlling this court in the contingency presented, we are obliged to affirm the ruling.

The fourth ground of appeal by plaintiffs is because sums paid for taxes on the property of the estate from 1858 to 1880 were allowed the administrator. The first objection to the allowance is because he was not assessed for the "personal property held by him in such representative capacity, his representative capacity being placed opposite his name." The assessment here was entered: Sanders01

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

**J. P., Est.** There are cases which hold that a Collector could not maintain an action against the administrator of an estate for the amount of the tax on personal property assessed to "the estate of" the deceased after the date of an administrator's appointment. They have no application here. An administrator cannot be charged either in a court of equity or law with a *devastavit* for the payment of taxes to which the property of the estate in his hands or under his control was subject. The only question which the distributee can here ask is, was the property subject to taxation, and did you by your payment discharge a tax to which it was subject? The administrator is no more obliged to take advantage of an assessment of personal property illegal in the manner here disclosed where such property exists and is subject to the tax than an individual is. We do not propose to follow the argument of plaintiffs when they deny that the estate had personal property to the extent to which the administrator paid the tax. It is enough to say that personal property of the estate to the amount for which the tax was paid had come to the hands of the administrator, and that it was then in his hands and that such moneys or personal property were subject to the tax. The position that the act of illegal investment without the dissent of the distributee changed the nature of the asset to a claim against L'Engle amounts to nothing, for if it be correct, which it is not, then the claim against L'Engle, itself was subject to tax as the property of the estate. The administrator here, however, had a right to treat the securities in his hands as the property of the estate. It is nowhere shown that his purpose was to convert them to his own use, nor were they in contemplation of law his property until the distributee rejected the investment. The equitable right of the distributee to the funds invested and the

---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

legal title of L'Engle as administrator existed until the distributee rejected the investment.

As we understand the fifth ground of appeal of plaintiffs, which is an order for the payment of the taxes on assessment of \$20,000 of personal property of the estate on the assessment of 1881, what has been said covers the question involved, and for the reasons stated we think it correct.

The fifth, sixth, seventh, eighth, ninth, twelfth, thirteenth and fourteenth grounds of appeal by plaintiffs relate to costs of the suit and allowance to the administrator for his services. Their consideration is postponed until other matters not involving so general a discussion of the nature of the case are disposed of.

The tenth ground of appeal of plaintiffs is because L'Engle, the administrator, is not charged with moneys which plaintiffs allege he had collected on a claim of the estate against the firm of Smallwood, Hodgkiss & Co. Upon these moneys plaintiffs claim compound interest from the time that the moneys came into L'Engle's hands as administrator.

The facts here are as stated by the Judge of the Circuit Court. These moneys were moneys collected by L'Engle as surviving partner of the firm of Sanderson & L'Engle upon a claim of J. L. Smallwood or Smallwood, Hodgkiss & Co. against Thomas Livingston & Co. The funds were in his hands as attorney and surviving partner of the law firm. His clients, although frequently requested to give him instructions as to the application of the funds, declined to do so. Other creditors of his clients were insisting that they had a better right to all or to a part of the funds than Sanderson's administrators had. L'Engle himself was not familiar with all the facts concerning the transactions between Sanderson and Smallwood. For his pro-

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

tection he files a bill of interpleader, produces the money and it is placed in a bank in Jacksonville by order of the court to abide a determination of the pending interpleader suit. The claim of the estate was sustained. The plaintiffs, the distributees, are entitled to the money. It is in the registry of the court and should be thus applied. During the pendency of the suit and before L'Engle has possession he is not chargeable with it or interest upon it unless he neglects to collect it for an unreasonable length of time and it is lost. So far as the estate is concerned the record does not disclose that this money was ever in L'Engle's hands as administrator, and it does disclose that before the claim of Sanderson against Smallwood, Hodgkiss & Co. came to L'Engle's hands, such firm was so notoriously insolvent that it would not give any direction as to an application of its assets, but left L'Engle not only to protect the estate, but to contend with all the other creditors of the estate. Again, how can L'Engle be charged with the debt as if lost, when the court has decided that the estate is entitled to the fund now in its registry.

So far as the matter of charging compound interest upon this claim is concerned, this court has frequently held that an administrator is only chargeable with such compound interest upon *moneys received* and L'Engle *has not received* anything here as administrator. There is no claim on account of unreasonable delay in collection after judgment of the court. So far as the objections to the allowances for costs in the interpleader suit is concerned we cannot collaterally question the judgment in that case. These allowances are directed by the court in that suit to be paid from a fund in its own custody. The administrator, however, is the party to act and to place the money subject to the orders of the court in this case or he will be responsible for delay.

---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

The next ground of appeal of plaintiffs, which does not concern general costs of the case and the allowances to the administrator, is the sixteenth, which is an order of the court directing the master to take testimony and report the amount due F. F. L'Engle for professional services rendered the administrators. The ground upon which the exception is based is that a creditor and an administrator cannot thus settle their differences in this case, which is a suit by heirs and distributees for an account and distribution, that the creditor should bring his independent suit at law or the administrator pay the amount due and ask credit for the voucher.

Upon an examination of the record we find that the exception taken to the master's report upon the subjects embraced in this ground of appeal were taken subsequent to the plaintiffs' appeal herein entered, and that the order of the court made thereon was made subsequent to the entry of the appeal by the plaintiffs. The entry of the appeal here was filed May 18, 1883, and the appeal is from orders of the court made on the 29th of March, A. D. 1883, and the 17th of May, 1883, while the report of the master as to this matter was in pursuance of an order of May 28, 1883. The exceptions to this report was filed after the entry of the appeal and after the order of the court thereon was made. There are a considerable number of irregularities in this proceeding, which the court, because no objection was made, has not alluded to. This, however, cannot be overlooked as it is a matter of jurisdiction. No appeal in this case brings the matter of the action of the court upon these exceptions to our attention. What has been said embraces all the grounds of appeal urged by plaintiffs, except those referring to costs and allowances, which we consider hereafter.

We now examine the grounds of appeal by defendants.



---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

The first ground alleged is charging the administrator, **L'Engle**, with any part of the interest on the amount deposited at Ambler's bank up to the time of his administration.

What are the facts? Sanderson died intestate about the 29th of June, 1871, leaving a considerable cash deposit in Ambler's bank. L'Engle was appointed administrator of Sanderson's estate on the 7th of November, 1871. Before his appointment, but in anticipation of it, he made a contract with the banker by which the banker agreed to pay interest on the moneys belonging to the estate which were then in his hands, or which should afterwards come to his hands, on condition that L'Engle would leave the funds there "during the winter, or the greater portion of it of 1871-2," or for such time as he should want such funds, not extending beyond such winter. L'Engle, under the contract, was to have the right "to withdraw the funds as the necessities of the estate might demand and in such sums as might be necessary." On the 5th of March, 1872, L'Engle, in his account with the bank, is credited for interest to July 1, 1871, \$89.44. This interest accrued anterior to L'Engle's contract. On the same date he is given a credit for interest from July 1, 1871, to date of entry, March 5, 1872, for \$1,968. L'Engle's first return extending from the date of his letters, November 7, 1871, to May 31, 1872, (a period of less than seven months) has no reference to the credit for this interest in his account with his depositary, the banker. In his account from the first of June, 1872, to and including May 31st, 1873, he charges himself with it as of the date of June 6, 1872. L'Engle has filed in this case a statement of his investments or loans of the funds of the estate in which the amount left on deposit with Ambler is not treated by him as an investment or loan of money. It

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

is not pretended that any part of the sum left on deposit, principal or interest, was lost. The moneys remained with the banker to the credit of the administrator and were drawn out for investment or disbursement at the discretion of the administrator. The Judge of the Circuit Court directed that the administrator be charged with the amount he realized for interest, \$1,968. If we understand the matter, the administrator insists that his transaction with the banker constituted an unauthorized investment of the money; that it was similar to a loan of money of the estate upon a mortgage not approved by the court, and that he was not chargeable with the interest credited to him by the bank. He insists further that he is chargeable with no interest upon the deposit during the time this interest accrued. Even if this is to be treated as an unauthorized loan, the administrator should be charged with some interest at least. We do not see, therefore, any foundation at all for the position that he is chargeable with *no interest* on the money. But we think it clear that this is not an unauthorized investment or loan for which the administrator is chargeable. In the first place, even if it be a loan, the administrator's account with the banker shows no loss. It shows that it has been paid by the banker. It was the money left by the intestate on deposit in the bank against which the administrator drew, in the general management of the estate. If an unauthorized investment is made during an administration and such investment is satisfied by payment, principal and interest, to the administrator it ceases to be an investment and becomes moneys of the estate, realized from such investment, and the administrator is thus chargeable if the distributee so desires. As a matter of course, there may be circumstances connected with the investment or loan of the fund which would give the parties interested as distributees a right to object.

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

to the whole transaction and claim more than what was realized from the use of the fund. Here, however, there is no loss. The money resulting from the contract has been realized; there is no existing investment or security to be rejected; no objection by distributees; and hence the fact of "risk," or the extent or nature of the "risk," which the administrator insists he assumed by leaving the money on deposit, are entirely immaterial.

The second ground of appeal of defendants. The Chancellor allowed L'Engle \$4,000 compensation for his services as administrator. The administrator objects to this allowance, and claims two thousand dollars. This sum was fixed by the Chancellor after hearing evidence as to the character of the services, and as to what would be a fair compensation. We have read the testimony and cannot say that there is any error in the action of the Chancellor. In this connection it is proper to refer to the objection that the administrator in this case invested the moneys of the estate in personal securities and where there was a mortgage security taken it was not approved by the Judge of the County Court. The result under the statute, as to this money, is simply that the administrator is chargeable as we have stated upon the former appeal. We do not understand the statute to provide for any forfeiture except in the case of the neglect of the administrator "to render" his annual account to the County Court, and the forfeiture there does not extend beyond commissions on amounts collected or disbursed and approved and allowed. In this case the administrator has been held to a strict account for all the moneys which came to his hands, as the statute required. If a distributee, upon the rejection of investments not authorized by law, but made in good faith by an administrator, succeeds upon a simple accounting in a master's office in recovering all that he is entitled to with compound in-

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court

---

---

terest at eight *per cent. per annum*, we think he cause to complain, and that the administrator should lowed, in the language of the statute, "a fair and just compensation" for his services not embraced in the term missions on amounts collected or disbursed, or und heads of compensation. The evidence discloses that ments very favorable to the estate were made of due by the estate. His accounts, while they we marked filed, were in the office where the law require to be. All the information which the distributees obtain with the file mark on them they could obtain them without the file mark. There is no loss. For care, attention and management he is entitled to compensation. This allowance, however, embraces all that be allowed to the administrator for care and attention. Any allowance made as an annual allowance, so plaintiffs have excepted, should be disallowed, as the statute does not authorize both.

The defendant's third ground of appeal relates to a claim against L'Engle for attorney's fees in this suit. Consideration is postponed until we reach the general question of costs.

The next ground of appeal, the fourth, of defendant because the master failed to credit the administrator's interest "on payments and disbursements." We think that the administrator is entitled to commission on moneys collected or disbursed in this case. Such commissions are to be allowed only on returns made as required by law. *Moore and Montford vs. Felkel and wife*, 7 F. and then they are restricted to accounts embraced in the returns for amounts collected or disbursed to the extent that are approved by the Judge of the County Court. McC. Dig., 207, Chap. 1013, Laws; McC. Dig., 97 and 98. This forfeiture, however, does not embrace "compensation

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

on money arising from the sale of personal property or land authorized by the statute. Under the decision of *Moore and Montford vs. Felkel*, 7 Fla., 63, 64 and 73, I understand the forfeiture under the statute extends only to commissions on amounts *collected* or *disbursed* and does not embrace "compensation" for sums realized from the sale of personal property or land or allowances for "care and attention to, and management of the property of the estate from year to year." *Thomp. Dig.*, 207 and 208; *McC. Dig.*, 98; *Moore and Montford vs. Felkel and wife*, 7 Fla., 63, 64, 73. We have several times alluded to the "annual returns" of an administrator, and "the returns made as required by law." While no objection is made here by either party to the date of the returns made by the administrator here, still the question of the forfeiture of the commissions to amounts collected or disbursed depends in part upon whether these returns are annual in the meaning of the statute and made at the time required by law, as if not so made this commission is forfeited. In this case the intestate died about the 29th of June, 1871, the administrator was appointed on the 7th of November, 1871, and his first return includes and ends with the 31st of May, 1872. This return is made eleven months after the death of the intestate, and six months and some days after the qualification of the administrator. It is, therefore, in no sense an annual return, unless the beginning of the year is to be fixed before the death of the intestate. This, we presume, no one will contend for. Under the act of 1859, Chapter 1013, Laws, it is provided that "administrators \* \* may make their *annual* returns at any time before the first day of June in each and every year." This statute should not be so construed as to repeal that portion of the law which requires *annual* returns when its language does not require such construction, and when

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

looking to the almost uniform policy of all the other States an administrator's first return commences from the time of *his appointment* and extends for such length of time as will enable him to get the estate in hand and make some comprehensive and full return of its condition, its liabilities and its assets. 3 Williams on Executors, 6 Amer. Ed., b. p. 1845 and 1846. Suppose the death of the intestate occurs on the 30th of April, does the law contemplate a monthly return for May? Is this an annual return within the meaning of the law? Again, the law does not provide that the fiscal year for administrators' accounts shall end on and with the thirty-first of May. On the contrary the law in express terms provides that such "annual returns" may be made "*at any time before the first day of June.*" If it can be made at "*any time*" before the first day of June, why say that it can be made to close only on the 31st of May. In this case the administrator was appointed November 7, 1871. His annual account should have embraced the period from the 7th November, 1871, to 7th November, 1872, and his return for that year was required by law to be made "*at any time*" between the 7th of November, 1872, and the first day of June, 1873. A return is not required to be filed by the first of June, unless between that date and the date of the letters of administration a year has elapsed so that an "annual return" can be made. It is true the words of the statute are "by the first day of June in each and every year." This means in each year in which an *annual* return can be made. No return for a part of a year is authorized unless it is the last return which may necessarily be for less than a year.

Before leaving the subject of returns and allowances by way of commissions and compensations, we wish to say generally that the exercise of discretion by the Circuit

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

Court upon these subjects, commissions and compensations within the fixed legal limits, should not be interfered with by an appellate tribunal except in a plain case of an allowance too large or too small approved by that court.

The next ground of appeal, the fifth, of defendant, L'Engle, is to the action of this court in not allowing L'Engle an item of \$4,166.66, which he charged to himself in his partnership accounts, but for which he claims he is not liable, and that his charge was a simple gratuity. The testimony of L'Engle and Littlefield and the exhibits give the history of the transaction out of which this debit exists. L'Engle says, "as to the amount of \$4,166.66, I say that between the 15th of April and the end of May, 1871, J. P. Sanderson informed me that he had made a contract for the employment of the firm of Sanderson & L'Engle and the survivor of said firm, by the Florida Central Railroad Company and the Jacksonville, Pensacola and Mobile Railroad Company for the term of three years, commencing on the 15th of April, 1871, at the compensation of \$20,000 per annum, payable monthly. At his request I reduced the said agreement to writing and he signed it, but no other party signed it. Afterwards, on the 22d of May, 1871, J. P. Sanderson executed an indenture, whereby he transferred and conveyed to myself all of his interest in the capital stock and property of the Jacksonville, Pensacola and Mobile Railroad Company. The object of such indenture being to secure the carrying out of the agreement I have just testified to by M. S. Littlefield, and also to guard against the non-payments of the drafts which I have testified to as having been given on the 15th of April, 1871, it being provided in said indenture that when said drafts should be paid and when all moneys due by said railroad companies or by said M. S. Littlefield to Sanderson & L'Engle, or either member of said firm, shall be fully paid and satisfied, that then I

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

should assign and convey to M. S. Littlefield, or to his orders, all of the said shares of capital stock and interest in said railroad. Subsequently, on the 15th of February, A. D. 1872, I made a contract with M. S. Littlefield cancelling all engagements for professional services. I had received no payment under the contract which I have testified to as having been signed by J. P. Sanderson. I met the memorandum of a contract which he had told me I had made, and no compensation whatever for services rendered said railroad companies or M. S. Littlefield since the 15th of April, 1871. *In cancelling my engagements with Littlefield and said companies I did not feel at liberty to give up the amount which he and the railroad companies were due to the firm of Sanderson & L'Engle, nor to cancel any engagement which had existed so far as the firm was concerned without indemnifying the firm for the claim so surrendered, therefore assuming that the memorandum of a contract given me by J. P. Sanderson was correct, and without inquiry whether or not it was correct, I charged myself with \$4,166.66, that being the proportionate amount of \$20,000 a year for the time the firm of Sanderson & L'Engle continued after the 15th of April, 1871. J. P. Sanderson lived two months and a half after the 5th day of April, A. D. 1871, and I charged myself with the amount that would have belonged to the firm under the memorandum of contract referred to if the payments had been actually made and received by me.* (Italics are by the court.) "That amount being assumed by me I felt at liberty under the indenture of the 22d of January, 1871, above referred to, to make the contract I did make with M. S. Littlefield, above referred to, dated 16th of February, 1872. I have never received any money under the contract, a memorandum of which, signed by J. P. Sanderson I have above referred to, nor under the contract of 16th of February, 1872, with M. S. Littlefield



---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

above referred to, but as I have stated I became responsible for and assumed all that the firm of Sanderson & L'Engle would have been entitled to under any circumstances, and in my accounts and dealings with the firm's business treated myself as having received the said sum of \$4,166.66 in money. The shares of capital stock in the Jacksonville, Pensacola and Mobile Railroad Company mentioned in the indenture of J. P. Sanderson to myself, dated May 22d, 1871, were four thousand shares in said railroad company. The contract above referred to between M. S. Littlefield and myself, dated February 16th, 1872, which contemplated a transfer to him of the said shares of stock in consideration of an abandonment of my interest as a survivor in any contract for professional services and for the other consideration stated in said contract, was not carried out and performed on the part of Littlefield. I have the four thousand shares of stock still, and will very cheerfully turn them into the estate of J. P. Sanderson in consideration of the amount I have charged myself, as above stated. I mean that if I am repaid the \$4,166.66 I have charged myself with one the firm books I will gladly assign the certificate of said stock. Said certificate and stock were among those, all of M. S. Littlefield's interests in which were sold under the proceeding in chancery I have above testified to. As a result of said sale whatever equity M. S. Littlefield may have had in said stock was extinguished and I hold and control them and am willing to transfer them as I have above offered to do. I had no personal knowledge of the terms of contract memorandum of which, signed by J. P. Sanderson, I have above testified concerning; I mean that I had no knowledge other than that derived from J. P. Sanderson until after Sanderson's death, when M. S. Littlefield informed me that the memorandum of contract was correct except as

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

to the amount of compensation. He stated that the amount should have been stated in said memorandum at fifteen thousand dollars." It is thus seen that according to L'Engle's understanding, there was due under the contract of April 15, 1871, to Sanderson & L'Engle, at Sanderson's death, this sum of \$4,166.66. This indebtedness it is seen was a part of the consideration of the contract of February 16, 1872, between Littlefield and L'Engle, enuring from L'Engle to Littlefield. This contract upon its face, (the contract of February 16, 1872,) shows its purpose to be to close all the matters existing between the parties. This is L'Engle's view of the matter. What does Littlefield say of this contract of the 16th of February, 1872? He says: "The contract of the 16th day of February, A. D. 1872, between E. M. L'Engle and myself, was a full, final settlement of all matters between myself and the railroad companies on the one part, and E. M. L'Engle and Sanderson & L'Engle on the other part, and of all and of every contract between us. This of course includes the contract of April 15th, 1871," (the contract under which the \$4,166.66 enured to Sanderson & L'Engle, and with which L'Engle charged himself or credited the firm,) "and of all moneys due under it." In the contract of February 16, 1872, there was this covenant: "It is further understood and agreed that no claim or demand shall ever be made by the said Littlefield, or the said Swepson," (whose agent Littlefield was,) "or by any of the said railroad corporations, or by any creditor thereof, or by any stockholder therein against the said Sanderson & L'Engle, or the survivor thereof, or against the legal representatives of the said J. P. Sanderson," (one of whose administrators the said E. M. L'Engle is,) "for any money so received by the said J. P. Sanderson in his life time, or by his legal representatives after his death, or by the said Sanderson & L'En-

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

gle, or the survivor thereof." Littlefield says this contract was inserted at the instance of L'Engle, and while Littlefield, in his testimony, restricts its operation to a payment of \$15,000 made to Sanderson in his life time, which sum Littlefield did not owe, and which Sanderson refused to account for except as a sum to be credited for future services by Sanderson & L'Engle, still it is apparent upon the face of the instrument that the covenant covers "any money" received by Sanderson in his life time, by his legal representatives after his death, or by Sanderson & L'Engle, or the survivor thereof, and while the terms of the covenant are restricted to "money," still to give it any effect as to the survivor, L'Engle, it must embrace any money due by Littlefield to Sanderson & L'Engle up to Sanderson's death, and which, according to the testimony of both L'Engle and Littlefield, was a part of the consideration of this contract of February 16, 1872. As to the matter of the adjustment of the account between Sanderson & L'Engle and Littlefield, arising out of the contract of April 15, 1871, Littlefield says "that he exhibited to L'Engle, sometime in the summer or fall of 1871, a statement in writing showing the sums of money I had paid to J. P. Sanderson and the firm of Sanderson & L'Engle, and the dates at which the moneys were paid, and the interest upon each item, with a view of having a settlement made according to the understanding, as I understand it, of a contract to be made between Sanderson, L'Engle and myself shortly after the 15th day of April, 1871. I cannot say whether L'Engle took the paper in his hands or not. He was not inclined to consider the paper. The subject matter of it was discussed between us and postponed for consideration at some future day. It never was referred to again to the best of my recollection until the contract was made on the 16th of February, 1872," (the contract under which L'En-

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

gle charges himself with the \$4,166.66, which sum he then claimed for Sanderson & L'Engle, and Littlefield allowed and which was part of the consideration enuring from L'Engle to Littlefield.) "The contract that I refer to was the one in which Sanderson was to account for moneys in his hands which I have already testified to." This attempt of Littlefield's at a settlement was effective for nothing. As further explanatory of the circumstances under which the contract of February 16, 1872, was made, Littlefield says: "In the summer of 1871, when E. M. L'Engle went North, our relations were friendly. During his absence and without consulting him, I conveyed the J. P. & M. Railroad Company to three trustees. This offended him very much, and when he returned late in the fall he informed me that in his judgment I had done a very foolish and unwise thing, and that he was opposed to the trust deed, and that he should resign as attorney of the railroad company and fight in the courts and otherwise the deed and the policy that was adopted by the parties then in charge of the road. In January, 1872, there was a bill pending in the Legislature of Florida authorizing the issue of two millions of dollars in bonds by the State to the J. P. & M. R. R. Co. There was great opposition manifested in and out of the Legislature to the passage of that bill and Messrs. Chase and Flagg and myself were anxious to overcome all opposition possible so as to secure the passage of the bill. We were afraid of Mr. L'Engle's opposition, he then being in Tallahassee. While he said nothing, we were afraid of his reticence and concluded it was better to make almost any settlement with him, even if we settled at his terms, than to attempt to get the bill through without his opposition. Mr. L'Engle claimed that because I had conveyed the road in trust, and the trustees having selected other attorneys, that I had violated and broken the con-

---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

tract of April 15th, 1871, and that he had a right to claim the full consideration named in the contract. Now it was for these considerations and desiring to have an amicable adjustment with Mr. L'Engle that I entered into the contract." It is thus apparent that the consideration which L'Engle gave to Littlefield for his part of the contract of February 16, 1872, was the rights of Sanderson & L'Engle (and the rights of L'Engle as survivor, if any existed) under their contract of April 15, 1871, by which Littlefield was to pay the firm of Sanderson & L'Engle \$20,000 per annum for and during the term of three years commencing on the 15th of April, 1871. While Sanderson interpreted the contract of April 15, 1871, as allowing \$20,000 per annum and L'Engle acted upon such construction, Littlefield says it was \$15,000 per annum. The Circuit Court has permitted in this conflict the charge to stand as L'Engle himself placed it, and we cannot say that the court should have reduced it to the sum due according to the \$15,000 rate. Nor do we understand that such reduction is claimed. The objection is to the entire charge. The books and the testimony of L'Engle disclose the history of the debit entry upon the books to be this: Under date of June 30, 1871, L'Engle debits himself with \$4,166.66, in these words "E. M. L'Engle to this amount assumed by you of liability of railroad companies for salary as attorneys under contract made April 15, 1871, the said amount being two and one half months of such salary, the whole time of Sanderson's life after contract was made. (See papers in tin box in safe.)" While the entry is placed on the account as of June, 1871, the entry was in fact made between Oct., 1873, and June, '74. The entry remained in that form until sometime in 1877 after the commencement of this suit, when L'Engle testifies he was making a memorandum by which W. A. Young could make up the account of each member of the firm with the

---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

firm. At that time L'Engle says: "I inadvertently erased that entry on the blotter, writing across it in black ink these words: 'This is wrong. It is an assumption by me without consideration.' Before I had completed the memoranda for Mr. Young I restored the entry to its original form by writing across it in red ink these words: 'The entry seems to be correct as originally made. Let it stand.'" There are other considerations recited as enuring from L'Engle to Littlefield under this contract, such as the transfer to Littlefield of certain stocks which L'Engle held as trustee. Littlefield in consideration of these matters gave his two promissory notes to L'Engle in his individual capacity for \$25,000 each. These notes, while they have been reduced to judgment, have never been paid by Littlefield. The debt due by Littlefield to Sanderson & L'Engle it is thus apparent was used by L'Engle in this contract with Littlefield. He, L'Engle, released it in consideration of the notes of Littlefield, and he properly charged himself with it in the accounts of the firm of Sanderson & L'Engle, to whom it belonged. It was not his individual property. Thus the account and charge stood when this case was remanded; L'Engle had made no exception to it. Under the consent of parties it was made the subject of a rehearing in the Circuit Court after the case was remanded and under the peculiar circumstances of this case, and for the reasons stated in the previous portion of this opinion, we examine it here again against the general rule controlling the subject. What are the grounds now upon which L'Engle seeks to have this, his own charge against himself, and which was unquestionably a proper charge, cancelled?

The testimony of L'Engle upon this subject does not set up any new fact in reference to this charge. He states that when he made the charge it was in connection with the credit entries of \$35,000 and \$998.33 made at the same

---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

time; that he "knew that the item was not a legal charge against him;" that there was no liability on him to account for that sum which had never been received by him, that because there was a large sum due him he was willing to set off against that credit all sums, even though he was not bound for them, which the most exacting person could say or think he ought to be bound for. It might, he says, have been thought by some persons that if I had not refused to be longer in the professional service of Mr. Littlefield and the J., P. & M. Railroad Company and had not assumed an attitude of hostility and active opposition to him and his schemes, I might have collected a large amount on the so-called contract of April 15, 1871. That having chosen to act as he did in that matter, that is to say, independently and in accordance with his own sense of professional dignity and propriety, and having as he believed due to him one-half of the sums of thirty-five thousand dollars and nine hundred and ninety-eight 33-100 dollars of fees which his late partner had collected and had not accounted for, he chose to forestall all unfriendly criticism by charging himself with the item of \$4,166.66, being all of the interest which J. P. Sanderson's estate would have had in the fruits of that contract if full payment had been made to him under it. Without adopting his language, we state that the administrator in his further statement says in substance that, except upon the hypothesis of his being allowed to share in the \$35,000 and \$998.33, he would not have made the entry; that he did not anticipate any suit, or any but the most friendly relations with Mrs. Sanderson and her brother; that afterwards when these relations changed, thinking that he was not liable, he wrote the words which are found across the charge cancelling it; that afterwards he thought it was not proper to make such a change while the litigation was going on, and because he was willing to

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

the set off stated he wrote in red ink the second indorsement; that both of the indorsements were intended to be mere memoranda. He reiterates that the money was never received by him and that he was not liable for it; that the Supreme Court having disallowed the item of \$35,000 and \$998.33. he is not willing that the charge of \$4,166.66 should stand as a charge against him. He further states that the Supreme Court having decided that J. P. Sanderson received in advance all that, in any event, his estate could have claimed under the contract of April 15, 1871, the charge of \$4,166.66 against him is now clearly wrong, if it ever could have been claimed to be right. He also states that the entry was made on the books by him in ignorance of the fact which he learned after the commencement of this suit that Sanderson had been so paid in advance. Analyzing this testimony it may be said:

First. To be explanatory of the changes in the entries upon the subject of this charge. What may have been the particular state of mind in which the witness was at the date of these several entries can neither enlarge or restrict his liability.

Second. The expression of the opinion that because this was one of two entries made by him in reference to fees which he thought, considered and treated as dependent one upon the other and one of them a credit, which he claimed being rejected by the Circuit Court and by this court, he should be released of the other, which was a debit that he admitted and made. This credit and debit, it will be seen, refer to different matters. There is no dependent connection between the \$35,000 and the \$4,166.66. As to the matter of the \$35,000 it was disposed of on the former appeal, we think correctly. We deem it unnecessary to repeat here what was there said. In addition to what was there said, we may, however, ask, why was it that no en-



---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

try of this sum was made upon the firm books as for professional services during Sanderson's lifetime?

Third. Because the Supreme Court had decided that Sanderson had received in advance all that, in any event, his estate could have claimed under the contract of April 15, 1871. This court holding that Sanderson as the representative of the firm of Sanderson & L'Engle had been overpaid necessarily held that L'Engle had as much interest in the money received in excess as Sanderson had, because his act was for the firm, and now upon the same principle L'Engle having received a consideration for the sum of \$4,166.66, and having made it available in this contract with Littlefield as an asset of the firm, he cannot expect to share in over-payments by Littlefield to Sanderson, and yet deny to Sanderson's estate its share here. It is admitted that L'Engle got this credit. He availed himself of this claim, and whether it was well founded was a question between him and Littlefield. So also the fact that L'Engle was ignorant of Sanderson's receiving of Littlefield sums in excess of what was due the firm of Sanderson & L'Engle is no more reason why Sanderson's estate should not participate in whatever of the assets of the partnership L'Engle made available, than it is that L'Engle should not participate in what Sanderson received beyond what was due the firm of Sanderson & L'Engle. In the case of the money received by Sanderson, the \$14,600, we remarked in the opinion upon the former appeal that Littlefield yielded any and all claim to recover back such sums by this agreement of the 16th February, 1872. The like remark is applicable to this sum of \$4,166.66, as the language of the contract clearly embraces all such sums. I can see no difference between the charge for \$14,600, and the charge for \$4,166.66 except that the \$14,000 was in cash received, and the \$4,166.66 was an asset

---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

used and made available by L'Engle in this contract, in which he received two notes from Littlefield for \$25,000 each. Whether he has realized anything from the \$50,000 in notes is a matter which does not affect the question and therefore what appears in this record, as to the purchase of certain stocks by L'Engle as the agent of Washington, and Littlefield's testimony upon the subject of the judicial proceedings in this matter, are immaterial. L'Engle made the asset available, and he was properly charged with it under the circumstances stated.

The next ground of appeal, (the sixth of defendant,) is because the master charged L'Engle interest on the balance found against him in the partnership account from the 25th of May, 1877. We are embarrassed in the consideration of this subject for the want of any assistance from either party. Neither of them express their views, and all that defendants' counsel, who makes this exception, says, is "why from the 25th day of May, 1877?" In the opinion rendered upon the former appeal, we said nothing as to the time from which or the amounts upon which L'Engle, as surviving partner, was to pay interest. We simply stated that the interest to be paid, if any, would be the legal rate, and that it should not be compounded, remarking at the time that "the debt here, if any exists, involves an accounting to ascertain it, and arises from a partnership relation." We think that the surviving partner here should, at least, pay the interest upon such balance as is found due by him by the master upon a general accounting as to the partnership transactions, because although the suit was then in progress he might have paid the ascertained balance into the court for the benefit of the parties entitled. In the case of *Beacham's Assignees vs. Eckford's Executors*, 2 Sand. Chy. Reports, 116, this was the rule adopted. The vice Chancellor in that case reviews the cases upon the sub-

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

ject of interest between partners. It will be seen that Chancellor Kent expressed the view in an opinion that the date of the dissolution was the proper time from which interest should be charged. *Stoughton vs. Lynch*, 2 John. Chy., 209. In the case of *Dexter vs. Arnold et al.*, 3 Mason, 289, Judge Story says: "Interest is not allowed upon partnership accounts generally until after a balance is struck on a settlement between partners unless the parties have otherwise agreed or acted in their partnership concerns." In this case the master followed the rule announced in 2 Sand. Chy. Reports, and his action was certainly not to the prejudice of the defendant, L'Engle. Chancellor Kent's view that the date of dissolution was the proper time from which to state a balance to bear interest, we do not think applicable to the circumstances of this case, if indeed it is the correct general rule. As I understand the charge here, it cannot be objected to as excessive as it represents a balance found due by the surviving partner to the estate of the deceased partner, and the interest is charged from the time the balance is ascertained and became a liquidated sum.

The next ground of appeal (the seventh) of the defendant is to the master's charge of \$1,308.74 on account of the judgment against Bettelini and Togni as of the 5th day of June, 1881.

The reasonable conclusion, from the testimony bearing upon this matter, is that the balance due upon a judgment which the estate had against these parties, which debt was also secured by a mortgage, could have been readily collected by the 5th of June, 1881, by the administrator with the use of that reasonable diligence and care that a prudent man exercises in his own affairs. Our views upon this subject after a review of the English and American authori-

---

---

Sanderson's Administrators v. Sanderson—Opinion of Court.

---

---

ties are expressed in the case of *Shepard's Heirs vs. Shepard's Adm'r.*, 19 Fla., 328 to 332.

The ground of appeal is not well taken.

The next ground of appeal of defendant, (the eighth,) is because the defendant was charged "compound interest on moneys not actually reduced to possession." The party who makes this exception, the defendant, does not state any particular item or charge in which this last has been done and we do not propose to look through several volumes of a record in search for illegal charges of any kind for either party. Such exceptions, in the language of the Supreme Court of the United States, are to be regarded as "frivolous."

The next ground of appeal of defendant, (the ninth,) is because the master charged the defendant interest on funds of the estate in his hands which have been or may be distributed to the infant complainant during the period in which there was no one authorized by law to whom he could properly pay such funds. This is a good reason why the administrator should not be required to pay over the funds of the infant in his hands to a person who wishes to receive them, but who is not authorized to do so. Such is the case here with Mrs. Sanderson. But because there is no guardian of an infant is no reason why funds in the hands of an administrator in which the infant has an interest is not to bear interest during the administration. Under the statute he is clearly chargeable with this interest. In addition to this, the remarks made as to the last exception are applicable here. 2 Daniel's Chy. Prac., 5 Am. Ed., 1,316, note 4, 1,309.

The tenth ground of appeal of defendant is because "there is error in the balance fund against the defendant L'Engle, both as administrator and surviving partner, and on the final accounting." This is likewise a frivolous ex-

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

ception within the meaning of the authorities. Independent of this, however, it must stand or fall, as the particular items excepted to are allowed or disallowed, and is thus disposed of.

The only remaining questions to be considered in these appeals arise out of the third ground of appeal of defendant, and the fifth, sixth, seventh, eighth, ninth, twelfth, thirteenth and fourteenth grounds of appeal of the plaintiffs, all of which are in reference to costs.

The ninth and twelfth grounds assigned by plaintiffs involve the question whether the administrator, in addition to his allowance of \$4,000, "as a fair and just compensation for his services," is also entitled to an allowance of two hundred and fifty dollars per annum for his services from May 31, 1876, to May 31, 1883. This is a matter of statutory regulation and there is no authority for an annual allowance in addition to what is decreed as "a fair and just compensation for his services." We have stated our views as to this matter when treating of defendant's second ground of appeal. See page 319 of this volume. As we have observed, there are several heads under which compensation is allowed an administrator. This being so, and the allowance here of four thousand dollars being made under but one head, it is evident that if the estate had been so conducted as to result in allowances to the administrator under the other heads, his compensation would have been considerably increased. Indeed such an allowance (\$4,000) might then perhaps have been properly excepted to by plaintiff as excessive. An allowance for services, care and attention should not be in such an amount as to compensate for other allowances to which the administrator has forfeited his right under the statute. The exception here is by the administrator on the ground that it is not enough and the exceptions of the

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

plaintiffs are to the other allowances and to costs. The allowance cannot be sustained.

The seventh ground of appeal by plaintiffs is the allowance of \$20.75 for a copy of an opinion of this court on the former appeal. In the bill of costs filed in this court there is this entry: "Certified copy of opinion to Circuit Court \$20.75." The judgment for costs of this court is against the plaintiffs for the sum of fifty dollars and eighty-cents, and this sum embraces the item of \$20.75 for the copy of the opinion certified to the Circuit Court. It thus appears that the charge must have been for an additional copy for the use of the defendant. It has never been the practice in this court to allow any costs for copies of opinions in the case thus furnished. Where an opinion is ordered to be certified to the Circuit Court, then its cost is taxed in the bill here. Either party desiring an additional copy must pay for it in the same manner as he does when he takes a copy of any of his adversary's pleadings in the Circuit Court, or a copy of a decree in a case therein for his own use.

The sixth ground of appeal of plaintiffs consists of objection to the allowance to the defendant of two hundred and twenty-nine dollars costs incurred by him for a copy of the record of this cause upon the former appeal to this court. This item of costs is incurred by one of the appellants after the entry of the decree and of the appeal therefrom in the Circuit Court. It concerned the appeal and was not the subject of taxation in the Circuit Court. The practice is to tax in this court the costs of a copy of the record of the decree of the Circuit Court upon the receipt of the Clerk of the Circuit Court for the amount paid him for it, when the decree is reversed. So far, therefore, as the administrator was entitled to any part of this sum paid for costs, it was the subject of taxation upon the former appeal.

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

by this court, and not by the Circuit Court upon remanding the cause, as it was no part of the costs of that court. A different practice prevails in the Supreme Court of the United States, but it is under a rule covering the precise subject. The practice as we state it is the practice in this State and in other States. *Worcester National Bank vs. P. D. Cheney*, 94 Ill., 430.

The fifth ground of appeal is the charging of Marion H. Sanderson with four-fifths of the costs incurred in the case prior to its being remanded to the Circuit Court in June, 1880. The ground upon which this order seems to be placed both by the Circuit Court and the administrator is to some extent the fact that this court upon the former appeal found that the infant had not sued by her next friend and that the widow had failed to allege her election as widow to take a child's part, and that we remanded the cause with leave to make the necessary amendment. 17 Fla., 830. We think that this amendment should have been allowed upon payment of the costs of the amendment alone. I have been able to find no case in which under like circumstances greater costs were imposed. The equity of the bill cannot be denied. There was a favorable decision for the plaintiffs upon the equity of the bill and the jurisdiction, and as it was within the power of the court and conformable to its rules of practice the amendment should have been allowed, we think upon the same terms at least that the court would have permitted an amendment by plaintiffs upon demurrer by defendant. If, upon the hearing of a demurrer or other pleading raising the question, the demurrer was sustained and amendment allowed, the costs of such demurrer would have been allowed but no more. Here there was a demurrer by the administrator, but the grounds upon which this court acted were not assigned by him, and the demurrer, as we have

---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

formerly held in view of the cases covering the precise point raised by it, was properly overruled. Where a demurrer sets up certain grounds upon which it is based, and these grounds are not found sufficient in law, it is sometimes the practice to charge the costs of the demurrer even though the bill is held defective upon grounds alleged *on tenus*. See this general subject discussed in 1 Daniel Chy Prac., 5 Amer. Ed., §599. Certainly where the amendment is directed by the court *sua sponte*, the defendant should stand in no more favorable position than he would if he had himself called the matter to the attention of the court. On the contrary, his failing to object, and going into the proofs and hearing, is rather a ground for favorable action to the other side. *Harrison vs. Righter*, 11 N. J. Eq., 395. We do not think the fixing of the proportion of costs incurred to be paid by Mrs. Sanderson in this suit at the rate specified should be influenced to the extent it apparently has been by the fact alluded to. As to what was said upon the former appeal in this case as to a statutory requirement of a bond by the next friend, it has been overruled since that case. *Pace vs. Pace*, 19 Fla., 448. Nor do we think it can be said as to the suit in its entirety that the distributees were the failing parties. The administrator as surviving partner had failed as to his charge of \$35,000 against the firm and the allowance of the Baxter account and the claim to share in the commission realized by Sanderson from the sale of the stocks mentioned. The distributees failed likewise to sustain themselves in many particulars. We think, however, that the question of costs as between party and party as well as costs between attorney and client should be regulated here more by a consideration of the general nature of the suit than by the fact as to who in point of money is the successful party in the controversy.



---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

This suit is of a two-fold character—First. A suit for account and distribution by distributees against the administrator. Second. A suit by the distributees of a deceased partner against the surviving partner for an account and decree, the surviving partner being the administrator of the deceased partner. We think, looking to the authorities, that as to the matter of costs it is not a very material fact that the administrator is found indebted in such a suit. This is usually the case and does not fix the rule as to costs of either side, while in the adjustment of partnership accounts if there is such resistance as has been made here by the surviving partner, if there is no account made by him to the parties beneficially interested in the estate of the deceased partner for over five years after the death of the deceased partner, and when an accounting is sought by those interested, a claim by the survivor of \$35,000 is rejected and he is charged with a claim of over \$4,000, which he resists, then the surviving partner has no claim to costs, either as between party and party, or attorney and client. He should be charged with the entire costs when, as in this case, he fails in the suit and is found indebted. Certainly plaintiff, in such a suit as this, should not be made to pay any part of defendant's costs, and it cannot be because there happens to be a fund in defendant's hand as administrator, *not as surviving partner*, in which the plaintiff is interested as distributee that that fund can be drawn from to pay defendant's attorney as surviving partner. The general rule as to costs in settling partnership accounts in cases of this character, is stated by Collyer to be "that the party against whom the balance is reported is *prima facie* the person to pay them." Coll. on Part., Sec. 12, page 188. This rule must control here, in so far as the costs incident to the settlement of the partnership transactions are concerned. The surviving partner who is found to be the debtor under the

---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

circumstances stated above should pay them. As a matter of course, what we say here is in view of the distribution of costs. So far as L'Engle urging any claim or resisting any charge in this partnership matter is concerned, he has the same right that any other person would have under the same circumstances. He thought he was entitled to the credits and had a right to claim it, and have the matter adjudicated.

As to the matter of the administration, we conceive the rule to be, notwithstanding the disallowance of some of the claims of the administrator, and notwithstanding the fact that upon an accounting he is found indebted to the distributees, that he is entitled to his costs as between party and party, and also to any reasonable charge which he has incurred for attorney's fees in the matter of his accounting. This, as a matter of course, when the administrator has acted in good faith, without fraud, and his administration is attended by the circumstances usually existing to entitle him to such allowance. In this case much has been said by counsel as to inability of the minor to give bond, and the unwillingness of the adult plaintiff to accept anything except a full transfer of assets. These requests were properly unattended to by the administrator because with outstanding debts it would have been a violation of his duty to creditors who have the paramount claim. This, however, would be no excuse for unnecessary delay in winding up the estate, for that is the first duty of the administrator, as in it is involved the speedy execution of his trust to all parties in interest. In this case the delay resulted in compromises very favorable to the estate. The estate has lost nothing. The administrator is here entitled to such attorney's fee as would be proper in case of an administration of this character, such fee to be fixed independent of any consideration of the service rendered.

---

---

**Sanderson's Administrators v. Sanderson—Opinion of Court.**

---

---

connection with his contest as surviving partner, and his entire costs of administration are properly chargeable against the assets in his hands or the moneys which he is to pay in lieu of them in the event distributees see proper to hold him to his statutory liability in case of investments not approved by the Judge of the County Court. These costs are to come from the fund and are not to be taxed against Mrs. Sanderson alone. The minor's interest in the fund is subject to this charge. Mrs. Sanderson is not responsible for the costs of her co-plaintiff. If not paid from the estate the costs would go against the next friend. Here they should be charged to the infant, as the suit is in good faith and for her interest by him. *Taner vs. Irie*, 2 Ves, Sr., 466, by Lord Hardwicke; *Bowling vs. Scales*, 1 Tenn. Chy., 618; *Union Ins. Co. vs. Van Renssalaer*, 4 Paige, 87; *Fearn vs. Young*, 10 Ves., 184; *Crump vs. Baker*, 18 Ves., 285; *Osborn vs. Dennie*, 7 Ves., 425.

What we have said covers the fifth, eighth, thirteenth and fourteenth grounds of appeal of plaintiffs, and the third ground of appeal of defendants, and disposes of the case.

There are some other objections made by the plaintiffs to the conduct of this suit in the matter of costs. We give them brief attention. It is insisted that there is a large amount of testimony here concerning the separate estate of Mrs. Sanderson. This is true, and by reference to the record it is seen that plaintiffs introduced the subject, and they have no ground to complain of its irrelevancy when the subject of costs is being considered. It is insisted that L'Engle occasioned the accrual of unnecessary costs in proving his accounts item by item, and that he should have brought his accounts in in the form of debtor and creditor, as required by the rule. The plaintiff had access to L'Engle's accounts in the County Court. He also objected to

---

---

City of Jacksonville v. L'Engle—Syllabus.

---

---

the master's taking L'Engle's accounts and exhibit to answer, as the foundation for the account therein stated. In addition to these facts, however, it is too late now to make such an objection available. The time to object was before the master, when he proposed to state the account. As to the matter of proving the accounts, the plaintiffs had a right to proof and if they wished to save costs, they could have readily waived it. Instead of that there was a persistent objection of one kind or another and even late as upon the former appeal it was objected that the accounts were not proved. Even the books of original entry of the firm of Sanderson & L'Engle were objected to as "immaterial to the issues in this case."

The decree is in all respects affirmed except as to costs and the case will be remanded with directions to have a retaxation of costs in accordance with the principles announced in the opinion herein rendered. Such order to cover costs accruing up to final decree.

Each party having failed in their appeals to this court will pay their own costs here.

---

THE CITY OF JACKSONVILLE AND ROY P. MOODY, TAX COLLECTOR, APPELLANTS, VS. EDWARD M. L'ENGLE, APPELLEE.

1. The act of the Legislature of 1877, Chapter 3025, amending section 29 of the act of 1869, (providing for the incorporation of cities and towns,) authorized the County Commissioners to prescribe new boundaries of an incorporated town, when, on the petition of five registered inhabitants of the town setting forth that "the boundaries of the town are of unreasonable and unnecessary extent," it shall be found by the Commissioners that the boundaries of such town "are extended beyond necessary and useful limits."

---

---

City of Jacksonville v. L'Engle—Statement of Case.

---

---

and include an undue amount of vacant farming lands." Another section of the act of 1877, authorized the County Commissioners to enlarge the boundaries of any city or town on the application of the corporate authorities thereof. Under this act the County Commissioners had no power to change the territorial limits of the town of LaVilla, Duval county, except upon the ground that the boundaries were "extended beyond necessary and useful limits, and include an undue amount of vacant or farming lands;" and these premises not existing, the order of the County Commissioners, made in December, 1877, reducing the limits of LaVilla, was unauthorized and void.

2. It was not lawful for the Commissioners to sever a portion of the territory of LaVilla for the sole purpose of annexing the same to the City of Jacksonville.
3. The proceedings of tribunals created by law must be shown to be within the powers expressly granted, and acts done by them not within such prescribed limits are nugatory.
4. The act in question was not inimical to the Constitution as conferring judicial functions upon County Commissioners; the powers conferred were not judicial within the meaning of the Constitutional restriction; they involved only the exercise of ordinary judgment and discretion in reference to the public interest and convenience, like that required in locating roads, bridges and other such affairs.

**Appeal from the Circuit Court for Duval county.**

This is an appeal from the decree of the Circuit Court of Duval county enjoining the collection of taxes by the Tax Collector of the City of Jacksonville, levied on the property of the complainant, appellee. The bill alleges that the property taxed is not within the territorial limits of the city; that certain proceedings were had in December, 1877, by the County Commissioners of Duval county upon the petition of certain persons as resident registered voters of the incorporated town of LaVilla, praying that a part of the territory in the eastern portion of the town of LaVilla be excluded from the corporate limits of LaVilla and the boundaries reduced, upon the ground that the limits were

---

---

City of Jacksonville v. L'Engle—Statement of Case.

---

---

of unreasonable and unnecessary extent, including much low, wet and swampy ground, dangerous to the public health, which the town is unable to drain and improve, but which the City of Jacksonville is willing to drain and improve, provided the same can be brought within the jurisdiction of that city.

The County Commissioners upon this petition and the petition of the authorities of Jacksonville made an order detaching a portion of the eastern part of LaVilla and annexing the same to the City of Jacksonville. The complainant's lots assessed and taxed by the City of Jacksonville are part of the territory so detached from LaVilla and annexed to Jacksonville.

These proceedings were had, or attempted to be had, under the act of the Legislature approved March 2d, 1877, Chapter 3025, amending Section 29 of the act of 1869, providing for the incorporation of cities and towns, &c. The section as amended reads as follows: "That whenever, in the opinion of any five or more of the registered inhabitants of any town or city in this State, the boundaries of such town or city are of unreasonable or unnecessary extent, such persons may set forth, in a petition to the Commissioners of the county in which such town or city is situated, their complaint of such undue extent of area in the corporate boundaries, whereupon the said Commissioners shall notify the Mayor of such town or city of the complaint, and appoint a day for hearing the statements of both parties, and if upon such hearing the said Commissioners shall be of opinion that the boundaries of such town or city are extended beyond necessary and useful limits, and include an undue amount of vacant or farming land, they may prescribe such new boundaries for such town or city as may seem to them right, and thereafter the boundaries so prescribed shall be taken to be the lawful boundaries of

---

City of Jacksonville v. L'Engle—Argument of Counsel.

---

said town or city, and shall limit its corporate authority.”

The second section of the act authorizes the County Commissioners to enlarge the boundaries of any city or town on the application of the corporate authorities thereof.

The order of the County Commissioners detaching the territory is as follows: “Whereas, five registered inhabitants of the town of LaVilla, in the county of Duval, have petitioned this board to have the corporate limits of said town of LaVilla reduced for the reasons set forth in said petition; and whereas, this board notified the Mayor of said town of LaVilla, as provided by law, of the said petition and set a day for the hearing of all parties interested in the matter of the said petition, to wit: this seventeenth day of December, A. D. 1877; and whereas, the said petitioners by their counsel and the said Mayor in person, and with counsel, this day appeared before this board and were duly heard; and whereas, this board having duly considered the premises are of the opinion that the prayer of the said petitioners should be granted; now, therefore, it is hereby ordered that such portion of the said town of LaVilla as may now be east of the following lines, to wit: \* \* \* \* \* be detached from the town of LaVilla. \* \* \*.”

Then follows an order annexing the portion so detached to the City of Jacksonville.

*Owen J. H. Summers* for Appellants.

*W. B. Young* for Appellee.

The defendant claimed that the proceedings before the County Commissioners were authorized by Ch. 3025, Laws of Florida, Acts 1877.

An injunction will lie to prevent the sale of land for a

---

**City of Jacksonville v. L'Engle—Argument of Counsel.**

---

tax for which it is not liable. *Gonzalez vs. Sullivan*, Fla., 791.

The first section of Ch. 3025 undertakes to confer upon the Board of County Commissioners judicial powers. The power to hear and determine is judicial. *Hays vs. McNeely*, 16 Fla., 413; *Ex rel. Scott vs. Board of County Commissioners of Jefferson County*, 17 Fla., 720; *The State of Rhode Island vs. The State of Massachusetts*, 12 Peters 657.

The Constitution classes the County Commissioners among the executive officers, (Art. V., Sec. 18,) and the Board of County Commissioners is not one of the courts specified in Art. VI of the Constitution. Section one of Article VI vests the judicial power of the State in the Supreme Court, Circuit Courts, County Courts and Justices of the Peace. Section 16 of Art. VI prohibits the organization of any courts not specified in the Constitution.

Section one of Chap. 3025 is in conflict with the Constitution and is null and void.

If the Legislature had the power to confer upon the County Commissioners jurisdiction to hear and determine the question as to whether or not a town was of undue extent, and to deprive it of a part of its territory, then, the proceeding being statutory, before a body of limited powers, the record must show affirmatively that such a case was brought before them as they were authorized to hear and determine, and that all the jurisdictional facts were found to exist. Where the jurisdiction and power to hear and determine depends upon the existence of a fact, that fact must appear or the proceedings are *coram non judice* and void. *Hays vs. McNeely*, 16 Fla., 409; 8 Porter 375; 18 Ala., 694; 15 Ala., 134; 31 Ala., 678; 5 Cal. 195; *King vs. Randlett*, 33 Cal., 318.

The statute requires as a prerequisite to the exercise



---

---

City of Jacksonville v. L'Engle—Opinion of Court.

---

---

the power of reducing the limits of a town that a petition should be presented setting forth that the town is of unreasonable and unnecessary extent, and such petition must be signed by five or more registered voters of the town. The statute requires the Commissioners to find, as a prerequisite to making the order, that the boundaries of the town are extended beyond necessary and useful limits and include an undue extent of *vacant or farming* land.

This last requirement shows plainly what was the purpose and intention of the Legislature in passing this act. It was clearly to relieve vacant or farming lands from the burthen of municipal government, and not to transfer them from one municipality to another. It is manifest that they never intended or contemplated the exercise of such powers as were attempted in this case.

A thing which is within the intention of the makers of a statute is as much within the statute as if within the letter, and a thing which is within the letter is not within statute unless it be within the intention of the makers. *Faber & Co., vs. Nassitts*, 12 Fla., 611.

The proceedings were neither within the letter nor within the intention of the makers of the statute, and the order was null and void.

THE CHIEF JUSTICE delivered the opinion of the court.

Neither the petition of the inhabitants of LaVilla, nor the order of the Commissioners, assert or find that the limits of the town of LaVilla "include an undue amount of vacant or farming lands." Neither does the board find that the boundaries of LaVilla are of "unreasonable and unnecessary extent," unless that may be implied from the making of the order curtailing the proportions of the town.

On the contrary they find that the detached portion in-

---

---

City of Jacksonville v. L'Engle—Opinion of Court.

---

---

stead of being “unreasonably and unnecessarily” included within the limits of an incorporated town or city, as vacant or farming land,” very proper territory to be included within such corporation, and forthwith proceeded to order that it be included within the limits of the adjoining city of Jacksonville.

The entire purpose of the act, so far as it relates to the tailment of boundaries, seems to be to ascertain whether “the boundaries of such town or city are extended beyond necessary and useful limits and include an undue amount of vacant or farming land,” and then to prescribe proper boundaries and thus “limit the corporate authority,” as expressed in the words of the act.

It is a well established rule that the proceedings of tribunals created by law, and whose powers are prescribed by law, must be shown to be within the powers expressly granted, and that acts done by them not within the prescribed limits are nugatory. It is unnecessary to cite authorities upon this familiar proposition.

The clearly expressed object of the act was that of relieving unoccupied and farming lands included within the limits of a municipal corporation from the burthens of taxation for municipal purposes, for which the owners of such lands did not enjoy adequate benefits, and the jurisdiction over which land was not necessary or useful to the corporation.

The power of the Board of County Commissioners to visit the premises was to inquire, inspect and thereupon to determine upon their individual judgment whether these lands were vacant or farming lands, and if so whether the boundaries were of unnecessary or unreasonable extent.

Nothing in the record of their proceedings appears indicating that these matters entered into or controlled the result, so that their order was based upon any such considera-

---

*City of Jacksonville v. L'Eagle—Opinion of Court.*

---

**Their** order appears to have been an arbitrary act, made ~~ir~~respective of the clear purposes of the statute. It was a ~~m~~ere dismemberment of a portion of one corporation for ~~the~~ purpose of enlarging the boundary of another. However meritorious the object to be attained, it was not within ~~the~~ contemplation of the statute.

It follows that the order of the County Commissioners ~~is~~ as unauthorized and void.

It was claimed on the part of the respondent that the ~~act~~ in question was unconstitutional because it attempted ~~to~~ confer judicial power upon the Commissioners, creating ~~a~~ court to "hear, try and determine" matters by the exercise of judicial functions. However unnecessary it may be ~~to~~ determine this point, (as the decree of the Chancellor is ~~sustained~~ upon the ground already stated,) we think this position not tenable. The power of the County Commissioners as conferred by the act of 1877, Ch. 3025, was not strictly judicial within the prohibition of the Constitution.

Like the power to hear and determine applications to lay out, open and discontinue roads, locate and build bridges, and similar powers and duties, they merely exercise such judgment and discretion, adopting such measures under the law as to them may seem conducive to the public convenience and public needs. Indeed, to deny the power of the Legislature to confer such duties upon ministerial officers, in the performance of which duties they merely exercise a discreet judgment with reference to the convenience and interests of the public, would have the effect to abrogate nearly if not quite all the powers and duties usually exercised by County Commissioners in conducting the ordinary business of the county.

\*The decree is affirmed with costs against appellants.

---

Howe v. Robinson et ux.—Syllabus.

---

THE CITY OF JACKSONVILLE AND ROY P. MOODY, TAX COLLECTOR, APPELLANTS, vs. PORCHER P. L'ENGLE, APPELLANT.

Appeal from the Circuit Court for Duval county.

*Owen J. H. Summers* for Appellants.

*John T. & George U. Walker* for appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

This case is identical with that of these appellants against Edward M. L'Engle, just decided.

For the reasons stated in that case the decree of the Circuit Court enjoining the collection of taxes by the appellants upon property in LaVilla, is affirmed with costs against appellants.

---

JAMES HOWE, (FOR USE OF CALVIN B. DIBBLE) APPELLANT  
vs. CALVIN L. ROBINSON ET UX., APPELLEES.

1. The creditors of a dissolved insolvent corporation may seek a court of equity to subject its real property and effects to sale to satisfy its debts without proceeding at law to judgment, execution and turn of *nulla bona*. In this case the time in which, by the statute, the existence of the corporation for the purpose of being sued was continued had expired.
2. The dissolution of a corporation does not extinguish its debts. Its debts survive, and its creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of a *bona fide* purchaser. Such property is affected with a trust *primarily* for the benefit of creditors.
3. The expiration of the time during which an execution may be issued

---

**Howe v. Robinson et ux.—Syllabus.**

---

upon a judgment under the statute without proceeding by *scire facias quare executionem non* does not destroy the binding efficacy of the judgment upon the land of the debtor, and the judgment creditor can resort to proceedings other than that of *scire facias* when he can make them available to collect his debt.

4. *Scire facias quare executionem non* does not lie upon a judgment against a dissolved corporation after the expiration of the time in which its existence is continued for the purpose of being sued.
5. Real property levied on under a junior judgment and sold, is still subject to the lien of an older judgment, and the circumstance of not proceeding upon the older judgment until a subsequent lien has been obtained and carried into execution will not displace the prior lien. The case of *Moseley vs. Edwards*, 2 Fla., 429, cited and followed.
6. The statutory limitation to an action upon a judgment in this State is twenty years. Where the judgment is against a dissolved corporation, the time which has expired is fifteen years, and during the greater part of this time there was no corporation in existence from which payment of interest or principal of the judgment debt could have been demanded, or against which proceedings to revive the judgment for the purpose of obtaining an execution thereon could be had, and there is no circumstance from which payment could be inferred, a court of equity will not refuse to enforce the judgment on the ground of laches or presumed payment of the debt. *Buckmaster vs. Kelley*, 15 Fla., 195, cited and followed.

Appeal from the Circuit Court for Duval county.

This case was tried before Mr. J. W. Archibald as Referee. The facts are stated in the opinion.

*H. J. Baker* for Appellant.

*H. A. Pattison* and *C. L. Robinson* for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This appeal from Duval county, Fourth Circuit, is from the judgment of a referee sustaining respondent's demurrer to appellant's amended bill and dismissing the bill.

---

---

Howe v. Robinson et ux.—Opinion of Court.

---

---

The bill alleges substantially:

That James Howe on the 12th of October, A. D. 1867, obtained a judgment against the Florida, Atlantic and Gulf Central Railroad Company in the sum of \$3,456.64; that in the year 1868 the road and rolling stock of the company was seized and sold by the Trustees of the Internal Improvement Fund of the State of Florida under mortgage bonds which constituted a first lien upon the road and rolling stock and franchises of the company to William Jackson and his associates; that the Trustees executed a deed to them covering the road, its equipments and franchises of the company; that the purchase money paid was about sufficient to pay twenty cents on the mortgage debt leaving nothing to pay plaintiff's judgment and other creditors; that said company was, at the time plaintiff obtained his judgment, seized and possessed in its own right of lot block 53, in the City of Jacksonville; that this lot was embraced in the mortgage lien under which the Trust sale was had, and that it is still subject to the lien of plaintiff's judgment of October 12th, 1867; that on the 12th of October, 1868, Jacob Edrihi obtained a judgment against said company; that in the year 1877 defendants, Calvin Robinson and Elizabeth Robinson, his wife, procured the levy of an execution, which was issued on the judgment of the 12th of October, 1868, in the year 1869, upon the said lot 6, block 53; that said levy was made "for the purpose, as is pretended, of perfecting an unlawful and illegal claim previously set up by the defendant, Elizabeth Robinson," and procured the advertisement of said land, and on the sale of said lot by the sheriff it was bid in by the said C. L. Robinson for his said wife; that the lot is still subject to said lien; that before any execution was issued upon plaintiff's judgment the Florida, Atlantic and Gulf Central Railroad Company was destroyed by the sale at

---

---

Hows v. Robinson et ux.—Opinion of Court.

---

---

transfer of its property and franchises as aforesaid and had no longer any legal existence.

Plaintiff prays: That the sale under the junior Edrihi judgment be set aside; that the deed made thereunder may be cancelled and set aside and that the lot may be sold and the proceeds of the sale be applied to his judgment of the 12th of October, 1867.

The grounds of appeal set up here are, first, error in sustaining the demurrer, and second, error in taking the exceptions to the answer as abandoned. The last ground of appeal has been abandoned here, both parties confining themselves in argument to the questions arising upon the demurrer, and to that subject we confine ourselves in the consideration of the case.

The first position assumed in support of this demurrer, and upon which, apparently, respondents rely with great confidence, is that the property of the defendant in judgment, which is in the possession of the respondents here, cannot be subjected to the claim of the plaintiff as he has not issued an execution upon his judgment, in other words, that equity will not take cognizance of the claim until execution issued, and return of *nulla bona* thereon.

We do not propose to discuss this question further than it is involved in this case. The plaintiff seeks here to subject property of a dissolved corporation to his judgment debt, and in such case as against the corporation it is not necessary that he should have even a judgment to entitle him and other creditors to a standing in a court of equity. The common law doctrine that a dissolution of a corporation extinguishes its debts does not prevail in this country. These "debts survive the dissolution of the corporation and creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of a *bona fide* purchaser; for such property will be

---

 Howe v. Robinson et ux.—Opinion of Court.
 

---

held affected with a trust *primarily* for the creditors of company." Wood *et al.* vs. Dunmar *et al.*, 3 Mason, 31 Curran vs. The State of Arkansas, 15 How., (U. S.) 30 Nevett vs. Bank of Port Gibson, 6 S. & M., 513; Hightower vs. Thornton, 8 Ga., 486; Shields vs. Ohio, 95 U. 324.

Says Chancellor Kent, the property and debts belonging to the corporation remain a trust fund subject to the cognizance and control of a court of equity for the benefit of the creditors. This being so, then as a matter of course there is no necessity for any proceedings at law, no requirement that the creditors shall exhaust any remedy at law before proceeding in equity, for "whenever a creditor has a trust in his favor, or a lien upon property for the debt due him he may go into equity without exhausting his remedy at law." Case vs. Beauregard, 101 U. S., 690. A comparison of this case with the case of Jones vs. Green *et al.*, 1 Wall. 330, seems to me to disclose marked inconsistency between the two when the subject of the rights of creditors in equity other than those assailing a trust fund for their benefit, is considered. This, however, does not affect the present case, as the plaintiff here has clearly a right to seek a forum of a court of equity. When this suit in equity was instituted more than three years had expired from the date of the judgment and from the date of the sale of the real estate and the transfer of its rights and franchises to its purchasers. The plaintiff could not have had an execution issued without a proceeding by *scire facias quare executionem non habet* and such a proceeding could not have been had under the statute, (Chap. 1639, Sec. 35,) unless it was instituted within "three years after the time of the dissolution of the corporation." After that time the law controlling the subject was the law applicable to a dissolved corporation independent of the statute, which is that a *scire facias quare executionem non habet*



---

---

Howe v. Robinson et ux.—Opinion of Court.

---

---

**non** does not lie against it. In the case of *Mumma vs. The Potomac Company*, 8 Pet., 281, this question was involved. Mr. Justice Story, speaking for the court, very summarily disposed of it in the following words: "There is no pretence to say that a *scire facias* can be maintained and a judgment had thereon against a dead corporation any more than against a dead man." At the same time the lien of plaintiff's judgment was not lost because an execution could not issue thereon without a *scire facias*. The lien of a judgment in this State is regulated by statute. That statute was construed and its effect determined in the case of *Moseley vs. Edwards*, 2 Fla., 429. In that case the time for issuing execution had expired, but an execution had been irregularly issued and a sale had thereunder. The court held that the lien of the judgment was not lost by the delay to issue the execution and gave effect to the sale, holding also that an execution so issued "was not void, but voidable only, and that the right of the plaintiff to sue out execution after such time can be questioned only by the defendant and not collaterally."

The cases of *Ridge vs. Prather*, 1 Blackf., 403, and *Lore vs. Harper*, 4 Hump., 116, in which it was held that the binding efficacy of a judgment continues upon land, although the power of taking out execution on it without a *scire facias* is suspended, are referred to approvingly in *Moseley vs. Edwards*. See also *Muir vs. Leitch*, 7 Barb., 341.

In the case in 2 Florida, as in this, the property had been sold under a junior judgment. The court held that "real property levied on under a junior judgment and sold is still subject to the lien of an older judgment and the circumstance of not proceeding upon the older until a subsequent lien has been obtained and carried into execution will not displace the prior lien." This

---

---

**Howe v. Robinson et ux.—Opinion of Court.**

---

---

disposes of all the questions which have been gested in connection with this case unless it be that laches in the plaintiff in not instituting an action upon judgment at an earlier date. The judgment bears October 12th, 1867. The corporation was dissolved 1868. This suit was instituted May 4, 1882, and the under the Edrihi judgment was had in the year 1877. statutory limitation to an action upon a judgment in State is twenty years. The time which expired from rendition of the judgment to the institution of this ac is fifteen years, and beyond the expiration of the time t appears on the face of the bill no circumstance from w payment could be inferred. On the contrary, during greater part of this time there was in being no one f whom the payment of interest or principal of the could have been demanded or against whom proceed to even revive the judgment for the purpose of having ecution, could have been instituted. The rule in equit to presumption of payment, where the period of tw years has not elapsed, is that "some other circumst must appear tending to the conclusion or raising the sumption that it has been paid," in addition to the laps time. *Buckmaster vs. Kelly et al.*, 15 Fla., 195.

The decree sustaining the demurrer is reversed and case will be remanded with instructions to enter de overruling the demurrer, and for further proceedings inconsistent with this opinion, and conformable to the r of equity applicable thereto.

•

---

---

Fridenburg v. Wilson, executrix, et als.—Syllabus.

---

---

**HORBE FRIDENBURG, APPELLANT, vs. EMILY R. WILSON,  
EXECUTRIX, ET ALS., APPELLEES.**

Where a plaintiff seeks to be subrogated to satisfied judgment liens on the ground that moneys loaned by him to the defendant in execution were so loaned for the purpose of paying such judgments, and were so applied, the judgment creditor is not a necessary party in a case where no decree is prayed against him.

The estate of a deceased testator is primarily liable to his debts. As to debts incurred by his executrix and executor subsequent to his death the estate is not liable unless the executrix and executor have power given them to create such charges upon the trust fund enforceable at the suit of the creditor, and such creditor dealing with the executrix and executor is held to notice of the trust and its nature.

When a testator directs his business to be carried on after his death, *prima facie* the only fund liable to subsequent creditors of his executors carrying on the business is that which was employed in the business by the testator. To authorize such creditors to resort to any other fund for payment the testator, by his will, must give the power in clear and unambiguous language. Where, in the will, there is a simple direction by the testator to his executor to carry on his business as he conducted it, so long as in his judgment it should be deemed best for his estate, to be closed and settled by his executor whenever he thought best to do so, and such will gives a power of sale of his real estate, no other portion of his estate is subject to debts incurred in the business by the executor except that which was employed in the business by the testator.

- A party loaning money to such executor to satisfy judgments obtained by a creditor against such executor for debts incurred in the business of the testator so continued after his death acquires no right against any of the estate not connected with the business at the death of the testator. Such portion of the estate as was not thus employed cannot be charged by a creditor. It is assets held by the executor in trust to pay *the debts of the testator*, and then to discharge legacies. To any proceedings seeking to charge such property for such debt the legatees and devisees having an interest under the will are necessary parties, and a

---

**Fridenburg v. Wilson, executrix, et als.—Statement of Case.**

---

judgment at law against the executor alone is not binding them.

5.A power under a will to sell real estate, the subject of named t does not give authority to borrow money from third per and to thereby involve the whole of the trust property.

Appeal from the Circuit Court for Madison county which this case was transferred from Duval county.

The provisions of the will of Converse Parkhurst are follows:

First. I give, devise and bequeath all my property, l real and personal of every name and kind, and whereso situated, unto my executrix and executor hereinafter nan upon the following terms: First, I direct my executrix executor first to pay all my just debts.

Second. I direct, and it is my will, that my business Jacksonville and Palatka, Florida, be carried on by executrix and executor in the same manner as I have ducted it, so long as in their judgment it shall be dee best for my estate, to be closed and settled by them w ever they think best to do so.

Third. I give and bequeath unto my sister R Devereaux, of St. Albans, Maine, the sum of one thous dollars.

Fourth. I give and bequeath unto my sister, N Parkhurst, the sum of one thousand dollars.

Fifth. I give and bequeath unto my sister, Mrs. I P. Hussey, of Pottsville, Penn., the sum of one thous dollars.

Sixth. To the three daughters of my deceased bro Daniel, I give the sum of one thousand dollars, to be vided between them, share and share alike.

Seventh. To my niece, Mrs. Wildott Smith, I give sum of five hundred dollars.

---

Fridenburg v. Wilson, executrix, et als.—Statement of Case.

---

**Eighth.** I direct the foregoing legacies to be paid as soon as conveniently may be after my decease.

**Ninth.** It is my will, and I direct that my children shall be supported and liberally educated, and the expenses paid out of my estate by my executrix and executor hereinafter named. My children to be supported by the estate until they respectively reach the age of twenty-one years, and after my son reaches the age of twenty-one, and until my daughter reaches the age of twenty-one, unless she shall die before my son, he shall be paid annually such sum as is considered proper for the support of my daughter until she reaches the age of twenty-one years.

**Tenth.** I will and direct that my beloved wife, Emily R., shall be paid quarterly until my youngest child becomes twenty-one years of age, such a sum as shall be necessary to support her in the style in which we have lived for the five years next previous to my death.

**Eleventh.** I will and direct that when my youngest child attains the age of twenty-one years, my estate, both real and personal, shall be divided equally between my wife and living child or children, share and share alike.

**Twelfth.** I hereby authorize and empower my executrix and executor to sell and convey the whole or any portion of my real estate, at any time or times they think best to do so.

**Thirteenth.** I hereby nominate and appoint my wife, Emily R. Parkhurst, and my nephew, Converse P. Devereaux, executrix and executor and trustees of this my will.

The other facts are sufficiently stated in the opinion.

*John Earl Hartridge and M. C. Jordan for Appellant.*

*A. W. Cockrell for Appellees.*

---

---

Fridenburg v. Wilson, executrix, et als.—Opinion of Court.

---

---

MR. JUSTICE WESTCOTT delivered the opinion of court.

The case is as follows:

This is an appeal from a decree sustaining defendants murrer to plaintiff's bill, and dismissing the bill by Judge of the Third Circuit, Madison county. The set up in the bill are as follows: Converse Parkhurst testate in 1872. His will is an exhibit to the bill. Under it all of the property of testator was conveyed to the executrix and executor, Emily R., his wife, and Convers Devereaux, "upon the terms" therein stated. He directed that his business at Jacksonville and Palatka, Florida should be carried on by his executrix and executor in the same manner as he had conducted it, so long as in their judgment it should be deemed best for his estate, to be closed and settled by them whenever they thought best to do so. After some special legacies to his relatives he directed the support and education of his children, and support of his wife until his youngest child should be twenty-one years of age. He then directed that his property be divided between his wife and children likewise equally. Under the will he gave the executrix and executor full power to sell and convey all or any portion of real estate at any time they thought best to do so. The executrix and executor qualified and received letters. Emily R. married James Y. Wilson. On the 19th of June, 1881, Devereaux was enjoined from further exercising the powers of executor. Since the death of the testator a large number of persons recovered judgments against the said Devereaux executor, and Wilson, executrix, for goods and merchandise sold and delivered to them in such official capacity and engaged in and carrying on the business left by said Converse Parkhurst at his death, which business they were

---

**Fridenburg v. Wilson, executrix, et als.—Opinion of Court.**

---

thorized by the will to carry on. Previous to and on the 9th day of November, A. D. 1878, the estate being hopelessly insolvent, certain of said judgment creditors having sued out executions were taking proceedings to sell portions of the real property of the estate, and on that day, in order to pay off or partially satisfy said judgments, Emily R. Wilson, executrix, and her husband obtained a decree of the court of chancery empowering them to borrow from plaintiff, Phoebe Fridenberg, the sum of six thousand dollars for two years, with interest at twelve per cent. per annum, and to secure the same by a mortgage on certain real property, which mortgage was duly executed and delivered by the executrix and her husband to plaintiff November 18, 1878, and plaintiff paid over the sum of six thousand dollars to said executrix and her husband. On the same day and out of said money they paid to the judgment creditors aforesaid, having liens upon said real property, the sum of \$1,759.62. The bill gives the names of the amounts paid to the judgment creditors, and the receipts of such creditors are exhibits to the bill. These receipts recite that the executrix and her husband desire to negotiate a loan from plaintiff and to secure it by a mortgage, and that the judgment creditors waive any lien they may have in favor of plaintiff upon the land proposed to be mortgaged in consideration of the sums paid them. The amounts thus paid were not sufficient to satisfy the judgments, and several months thereafter certain of said judgment creditors (the bill gives their names) directed the sheriff of Duval county to levy upon and sell to satisfy the balance of their judgments certain "real property of said estate." The land is described at length in the bill. Certain parts of the estate mentioned were sold by the sheriff to defendant, Thomas M. Wilson, under the executions. The bill describes the property sold, gives the dates of sale and prices

Fridenburg v. Wilson, executrix, et als.—Opinion of Court.

paid. Deeds for the land thus sold were executed and delivered by the sheriff to said Thomas M. Wilson. Certified copies of the deeds are exhibits to the bill. After the execution and delivery of said deeds to Thomas M. Wilson he conveyed to "innocent purchasers" certain portions of the land. The bill gives a description of such as was thus sold, and plaintiff makes no claim against them.

Plaintiff alleges that she is informed and believes that the proceeds of the said sales by Thomas M. Wilson were applied to the use and benefit of the said estate, and that certain property, (mentioning it) which the bill describes as having belonged to the estate and as purchased by Thomas M. Wilson, now stands upon the records of the deeds of said county in the name of Thomas M. Wilson. As to this property plaintiff, upon information and belief, alleges that is actually in the possession of the executrix and her husband; that Thomas M. Wilson "is not and was not a *bona fide* purchaser of said property" at said sales; that he did not pay the amount bid on the said piece of property at said sales, and that said amounts or sums of money were paid by said James Y. Wilson out of funds then in his hands belonging to the estate of C. Parkhurst, deceased; that James Y. Wilson was a defendant in all said judgments and was the person who bid at the sale of lot 4 in block 10, and that the bid for said lot was knocked off to said Thomas M. Wilson, at the request of said James Y., the said Thomas not being present at the sale, and that all the acts performed by the said James Y. Wilson in and about said sale were done and performed to defeat the liens of the other of said judgment creditors mentioned and to delay, hinder and prevent them from subjecting said property to the payment of their judgments; that said lot one (1) in block one hundred and thirty-three (133), and also another piece or parcel of land embraced in the sheriff's deed, (plaintiff describes



---

Fridenburg v. Wilson, executrix, et als.—Opinion of Court.

---

it in the bill) was bid off, as your orator is informed and believes, by Geo. S. Wilson, the brother of said James Y., in the name of Thomas M. Wilson, their nephew, but for the benefit of the estate of C. Parkhurst, and was paid for out of funds of the said estate or of said James Y. Wilson, who was a defendant to said judgments rendered; that Thomas M. Wilson was not present at said sale; that all the acts done and performed in and about said sale were in the interest of said James Y. Wilson to defeat the liens of other of said judgment creditors, and to delay, hinder and prevent them from subjecting said property to the payment of said judgments. The defendants having failed to pay the mortgage debt of \$6,000, plaintiff filed a bill of complaint to subject said mortgaged property to sale. Defendants, Emily R. and James Y. Wilson, demurred to said bill; that the demurrer was overruled. A plea setting up that the children of said Converse Parkhurst were not parties, and that at and before the death of said Converse Parkhurst a part of said property, naming it, had been used as a homestead and had been so used by his wife and children since his death, and upon appeal to the Supreme Court said court adjudged that the order authorizing the executrix to borrow the money was void against said children and said property (see Wilson vs. Fridenburg, 19 Fla., 461); that said homestead property constituted and composed the principal security upon which said loan was made, and that the remaining property mortgaged is utterly inadequate to satisfy the sum now due on said mortgage, said sum being about \$10,000; that said estate is "utterly insolvent and has no other property except a lot of land of the value of about \$400, which is about to be sold under other judgments and executions against said estate." Plaintiff then alleges that the balance due upon the executions and judgments men-

---

---

Fridenburg v. Wilson, executrix, et als.—Opinion of Court.

---

---

tioned was paid by sales of certain property in Palat Putnam county, Florida.

Plaintiff prays: That an account may be taken of amounts of money paid on said judgments by defendants out of the money paid them by plaintiff for such purpose and interest thereon; that the said deeds from the sheriff to said Thomas M. Wilson, except in cases where the said Thomas M. has conveyed the land to innocent purchasers be decreed to be void; that so much of said judgments were paid by said Emily R., executrix, and James Y., her husband, out of the moneys loaned them by plaintiff, may be decreed to be "unsettled and paid," so far as plaintiff's rights are concerned; that the property recorded in the name of Thomas M. Wilson (describing it) may be decreed to be subject to the lien of said judgments so far as the same were paid out of the moneys loaned to said Emily R., executrix, and her husband; that plaintiff may be decreed to be subrogated to the lien of said judgments and to stand in the place and stead of said judgment creditors, and that there may be a sale of said property, or so much thereof as will satisfy and indemnify her for the money paid on the said judgments out of the funds loaned by her as aforesaid and as may appear by the accounting prayed for. Plaintiff concludes her bill with the prayer for other and further relief, &c.

A demurrer to this bill was sustained. The first ground of the demurrer is want of equity in the bill. The consideration of this ground is involved, to a great extent, in the consideration of the other special grounds assigned and will be discussed in connection with them. The next is want of necessary parties, it being insisted that the judgment creditors are necessary parties if a case of subrogation to their liens is made by the bill. Plaintiff alleges first that a part of the funds which she loaned under the order of the

---

---

Fridenburg v. Wilson, executrix, et als.—Opinion of Court.

---

---

court went to satisfy a part of the judgments against the executrix and executor of the will. She, then, in the last clause of the bill, alleges that the balances due upon these executions and judgments were paid by sales of certain property in Palatka, Putnam county, Florida. Their judgments are, therefore, satisfied. No decree here is prayed against them. They have no interest and are not necessary parties. Whether the land here assailed is sold or not is immaterial to them and the decree in neither event would affect them.

The next ground of demurrer is that "said bill shows that a loan was made by complainant to certain of these defendants of the moneys herein sought to be recovered and the fact of such loan rebuts, repels and contradicts the implication of the trust sought to be asserted by said bill."

I do not understand that it is contended by the plaintiff that she is a *cestui que trust* as to this land. Certainly the facts set up in the bill disclose no such relation. What she claims is an equity independent of any relation of trustee and *cestui que trust*. It is to be subrogated to a lien upon property of the estate, which lien has been relieved by money borrowed from her by the executrix under a decree of the Chancellor and payment of other sums from the property of the estate as against which she claims an equity exists by virtue of the fact that she has loaned money to the executrix and the property thus sought to be subjected is the property of the estate although the title is in a third person, the purchase money, if any was paid for it, being, as she alleges, money of the estate, and the purchase being in fact by the representatives of the trust under the will. In other words, it was still in equity to be treated as the property of the estate subject to her claim for moneys loaned to the executrix under the order of court. Neither of the relations claimed to exist constitute

---

---

Fridenburg v. Willson, executrix, et al.—Opinion of Court.

---

---

a trust. She claims reimbursement from the trust property on the ground that she is *ex oequo et bono* entitled to it according to the principles of equity controlling the subject. See *Scott vs. Dunn*, 1 Dev. & Bat. Eq., 425; see cases cited in 30 Amer. Dec., 177.

The other grounds of demurrer are "that said bill shows that said judgment created had no lien whatever on lands or personal property of the estate," and that "the causes of action as shown by said bill upon which judgments were recovered was not the covenant or obligation of said Converse Parkhurst." What we say in reference to the case generally, and independent of special reference to these particular grounds, will embrace them.

This case concerns and arises out of express trusts under a will. The claim here made is subordinate to the trust; it results from relations existing between the executrix and the plaintiff subsequent to the death of the testator, not by virtue of any relation of the plaintiff herself to the testator. The will provides first for the payment of debts of the testator. To these the estate was first liable independent of a testamentary direction. As to subsequent sums of money borrowed by the executrix, the estate is not liable unless the executrix has the power to create such a charge on the trust fund enforceable at the instance of the creditor.

The exhibits to the bill in this case disclose that the property sought to be subjected to the alleged equity of the plaintiff was property acquired by the testator and the allegations of the bill show that the judgments obtained against the executrix and executor, to the lien of which the plaintiff seeks to be subrogated, were for goods and merchandise sold and delivered to them in carrying on the mercantile business of the testator as authorized by the will. By the rendition of such judgments it is not all

---

---

Fridenburg v. Wilson, executrix, et al.—Opinion of Court.

---

---

that the court of law judicially determined that these particular pieces of property were subject to them. Indeed, for the purpose of disposing of this demurrer, we must treat these judgments as being judgments to be satisfied *de bonis propriis*, as that was the only judgment that could have been rendered at law, and the plaintiff does not allege that they were judgments in terms to be satisfied *de bonis testatoris*. Unquestionably the executors, as a general rule, are personally liable. *Laible vs. Ferry*, 32 N. J., Eq., 795, and cases cited; *Ex-parte Garland*, 10 Ves., 120. Here there is nothing liable in equity to the claims of these posthumous creditors, under the terms of this will, except the fund employed in business at the time of the death of the testator, and to any proceeding in equity which constitutes an assault of this character upon the trust property, the legatee and devisees are necessary parties as they have an interest. It is from this fund that the legacies are to be realized. In the language of the Supreme Court of the United States, *Smith vs. Ayer*, 101, U. S., 320, "such assets are held by the executor in trust to pay the *debts of the testator* and then to discharge legacies."

Where a testator directs his business to be carried on after his death, *prima facie* the only fund liable to subsequent creditors of his executors carrying on the business is that employed in the business by the testator. To authorize such creditors to resort in equity to any other fund or property for payment, the will by clear and unambiguous language must authorize it. The bill in no manner connects this fund with the business. In this will there is the simple direction to carry on the business as he had done. This is not sufficient to charge general assets not connected with the business. *Laible vs. Ferry*, 32 N. J. Eq., 791; *Smith vs. Ayer*, 101 U. S., 330; *Burwell vs. Mandeville*, 2 How. U. S., 560.

---

---

Fridenburg v. Wilson, executrix, et als.—Opinion of Court.

---

---

For what these executors did in good faith in obedience to their trust they are entitled in equity to be indemnified out of the property lawfully embarked in the business from this title to indemnity springs an equitable right in the creditors, very like a lien, to resort to the same fund for payment when their remedy against the executors is failing. *Ex-parte* Garland, 10 Ves., 110; *McNeil vs. Barton*, 2 Eq. R., 21; 2 *Perry on Trusts*, §810. There is no allegation in the bill that this land had any connection with the business of the testator in Jacksonville or Palatka. For that reason it is clear that there is no claim, much less a lien, of the judgment creditor, or right of indemnity against the executor, (1 *Perry on Trusts*, §154,) to which plaintiff can be subrogated as against the *cestuis que trust* or legatee under the will. So far as the effect of the mortgage is concerned, see *Wilson vs. Fridenberg*, 19 Fla., 461.

The only other equity which the plaintiff can claim against the land, the paper title to which is in Thomas Wilson, but which land he alleges, was paid for by the moneys of the estate, must exist by virtue of the loan made to the executrix, if it exists at all.

Plaintiff does not allege any appropriation of this money loaned, other than the \$1700 or \$1800 applied to the judgments against the executors on account of the trade specifications. We have seen that there is no equity against the executor arising out of this appropriation to the trade judgments except as to the property employed in the trade. Is there any equity arising out of a simple loan to the executrix, or appropriation to any of the purposes of the trust be shown? The power here is to sell any portion of the estate at any time or times the executrix and executor think fit. There is no general power to borrow money or contract debts. A power in an executor to sell real property, subject of named trusts, does not give authority to borrow

---

---

Fridenburg v. Wilson, executrix, et als.—Opinion of Court.

---

---

ey *ad libitum* from third persons, and to involve the  
le of the trust property, whether the loan has been ap-  
l to the purposes of the trust or not. Where the money  
owed is applied to the purposes of the trust a different  
tion arises. Here there is no such allegation. We do  
mean to say that where a power of sale is exercised  
there is no collusive purpose that the purchaser is held  
e to the application of the proceeds.

hile we are limiting general expressions, we also wish  
y that we express no opinion as to whether the general  
r to sell here includes the power to mortgage, or  
her any of the estate of the wife is subject to the  
a here. We simply state the general rule as to the lia-  
y of executors, and rights of those dealing with them,  
out reference to any questions arising from the fact of  
coverture of the executrix or any other fact which, if  
ists, might or might not constitute an exception to the  
ral rule.

s to parties, we will again say that the legatees and de-  
s are necessary parties to any bill which seeks to sub-  
any of the property not embraced in, or which has re-  
ed from the trade. While at law, the trustee is the  
esentative of the estate and will, yet in equity the *cestui*  
*trust* is considered the absolute owner to the extent of  
interest. 1 Perry on Trusts, §328.

The decree is affirmed, but it is done without prejudice  
any claim which plaintiff may have against defendants  
sonally.

---

Montgomery et al. v. Knox et al.—Statement of Case.

---

LUCIEN MONTGOMERY ET AL., APPELLANTS, VS. WM. ~~KNOW~~.  
KNOX ET AL., APPELLEES.

1. A suit in equity by one or more members of an unincorporated ~~association~~ association for the purpose of mutual fire insurance, seeking the ~~appointment~~ appointment of a receiver of the property of the association ~~and~~ and the continuance of its business by him, should be brought against the other members of the association and not against its executive officers alone.
2. Where the claim is for damages resulting from false and fraudulent representations made by the defendants to the plaintiffs, the remedy, if the plaintiffs have a case, is at law not in equity.

Appeal from the Circuit Court for Volusia county, to which the case was transferred from Alachua county.

William M. Knox, of Alachua county, Florida, and Herbert Wagner and John Van Collins, partners as Wagner & Collins, of Crockett, Texas, file the bill in this case against Lucien Montgomery, David A. Miller, George W. Means and Calvin W. Keep.

Plaintiffs allege that defendants since the 4th of May, 1881, have represented that they were the officers of a corporation called the Florida Mutual Fire Association, "incorporated under the laws of Florida with privileges perpetual," and that said Montgomery was the President, Calvin W. Keep the Vice-President, George W. Means the Treasurer, and David A. Miller the Secretary of said incorporated association; that they represented that said association was a reciprocal, benevolent institution, organized for the mutual protection of the property of its members from loss by fire; that by reason of such representations and of the further representation that if plaintiffs would become members of said association that certificates of membership would be issued to them granting protection against



---

---

Montgomery et al. v. Knox et al.—Statement of Case.

---

---

loss by fire upon such terms and conditions as were specified in the by-laws of the association, and that upon such loss by fire being sustained by a member of said association that an assessment would be made upon all the members for the purpose of paying such loss; that plaintiff, Wm. M. Knox, relying upon such representation, became a member of the association on the 7th of August, 1882; that four certificates of membership were issued to him, and that he has complied with all the requirements of defendants as stated in said certificates in the payment of semi-annual dues and assessments. and that these certificates, four in number, each insure a stock of merchandise for \$1,250, aggregating \$5,000.

Plaintiffs allege further that a like certificate of membership was issued to Herbert Wagner and John Van Collins, as Wagner & Collins, by which they were insured in the sum of \$2,000 "on their stock of general merchandise," and that they had complied with all the requirements and paid all assessments and dues as stated in said certificates.

Plaintiffs charged that the property thus insured had been lost by fire since they became members of the association, and that such loss was without any fault, misconduct or negligence upon the part of insured, and within the terms of the certificates.

Plaintiffs allege that relying upon said certificates of membership they expected said sums to be paid or such amount as could be realized by assessment, but that they have paid plaintiff, Knox, only the sum of fifty dollars, and have failed to pay Wagner & Collins, and have failed and refused to make any assessment.

Plaintiffs allege that large sums of money are being collected by the defendants from the members of the so-called Florida Mutual Fire Insurance Association, and being by defendants illegally and fraudulently applied to their indi-

---

---

Montgomery et al. v. Knox et al.—Statement of Case.

---

---

vidual purposes; that Keep, Means and Miller, three of defendants are insolvent; that defendant, Montgomery, worth a sufficient amount of property to reimburse them but that they have reason to believe that said Montgomery is now seeking to dispose of his property, so as to protect himself from their just and equitable claims, and that without relief is immediately afforded them, "to avoid a determination of suit by the ordinary process of the law that a judgment which they might attain would avail them nothing."

Plaintiffs pray that Montgomery be enjoined from selling or encumbering his property, real and personal, and that he may be subjected to the payment of his debt; that a receiver be appointed to take charge of the money, books, papers and assets of the said so-called Florida Mutual Fire Insurance Association, and manage and control its business under the direction of the court; that the defendants be ordered to forthwith deliver up to such receiver all the monies, assets, books and papers of the said so-called Association; that the defendants be enjoined from interfering with the receiver; that a decree may be made for plaintiffs against the defendants, Keep, Means and Miller, in the amount of their claims, and that the money and all other property of the said so-called Association be also applied as far as necessary to the payment of their claims, and if the assets be not sufficient, or not so liable, then that the property held by said defendants or any one of them be subjected to the payment of said claim and for other and further relief.

The Chancellor without notice appointed a receiver to take charge of the books and assets of the association with power to continue its business until the further order of the court, requiring a bond in the sum of two thousand dollars, and directed that Montgomery, one of the defendants, should

---

---

Montgomery et al. v. Knox et al.—Argument of Counsel.

---

---

show cause why an injunction should not be granted enjoining him from selling any part of his property.

From this decree this appeal is taken.

*Taylor & Sanchez* for Appellants.

*Ashby & Thrasher* for Appellees.

The defendants having appealed from the decree of the Judge appointing receiver, without filing plea or answer, the allegations of the bill must be taken as true, and the only question for consideration is whether or not the bill presents such a state of facts as justify the decree entered.

If the so-called Association was not an incorporated Association then the parties representing themselves as the officers became personally liable to the complainants for any loss which they may have sustained by reason of the false representations made to them.

An unincorporated company is a mere partnership, and each member is liable for the whole amount of the debts of the company in the same manner that each partner is responsible for the entire liability of the firm. *Angell & Ames on Corp.*, sec. 581; *English vs. Wall*, 12 Rob. La., 132; *Gorman vs. Russell*, 14 Cal., 531; *Tappen vs. Baily*, 4 Met., 529; *Taft vs. Ward*, 106 Mass., 518; *Taft vs. Ward*, 111 ib., 522.

This rule prevails whether the parties intended to bind themselves as partners or not. An application of the rule has occasionally become necessary against persons acting as a corporation when not authorized to do so, either because they were not incorporated, or were acting beyond the State where the corporation could do business, or after its charter had expired or been forfeited. Persons assuming to act for a non-existing corporation are personally re-

---

 Montgomery et al. v. Knox et al.—Argument of Counsel.
 

---

sponsible. Field on Corporations, sec. 178; Herod Rodman, 16 Ind., 241.

This rule is indispensable to avoid a complete failure of justice. The supposed corporators or stockholders have obtained the benefit of a contract when there is no corporation to be bound it must follow either that they shall be held liable, or that the other contracting party have a remedy whatever. Those who act as directors, there being no corporation, are liable personally. Field on Corporations, sec. 179; Williams vs. Bank of Michigan, 7 West 542; Maulsley vs. De Blanc, 2 C. & P., 409; Hill vs. Beaumont, 1 Beas., ch. 31.

The fraudulent misrepresentations of the defendants, charged in the bill, were of such character as to bring them within the definition of fraud according to Pothier, who says "that the term fraud is applied to every artifice made use of by one person for the purpose of deceiving another." 1 Pothier on Oblg. by Evans, pt. 1, ch. 1, sec. 1.

Fraud is defined to be any cunning, deception or artifice used to circumvent, cheat or deceive another. 1 Story J., §186. Fraud, indeed, in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, by which an undue and unconscientious advantage is taken of another. Ibid, sec. 187. "Fraud \* \* being so various in its nature and extensive in its application to human concerns, it would be difficult to enumerate all the instances in which Courts of Equity will grant relief under this head." Ibid, sec. 189.

It may be laid down as a general rule, subject to a few exceptions, that courts of equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with, and sometimes exclusive of other courts. With the excep-

---

---

Montgomery et al. v. Knox et al.—Argument of Counsel.

---

---

of wills, courts of equity may be said to possess general and perhaps a universal concurrent jurisdiction with courts of law in cases of fraud, cognizable in the latter, and exclusive jurisdiction in cases of fraud beyond the reach of courts of law. Ibid, sec. 184.

The appellants complain that Wm. M. Knox and Wagner & Collins are improperly joined as co-complainants. Their demands arise out of the same state of facts, and we submit that in order to avoid a multiplicity of suits they were properly joined as complainants. The general doctrine is that all persons materially interested in a suit in equity should be made parties, either as plaintiff or defendant, in order to prevent a multiplicity of suits, &c. 4 Cowen, 682; 1 Pet., 299; 13 Pet., 357; 24 Maine, 20; 7 Conn., 342; 11 Conn., 112; 11 Gill, and J., 426; 1 Rand., 451; 2 Blackf., 223.

The appellants say that "the bill is wanting in equity because it seeks in equity to attack and call in question the legal existence or non-existence of a corporation." It will be found by examination of the bill of complaint that the so-called corporation is not made a party to the suit, its corporate existence is repudiated and the defendants in the courts below, by failing to file plea or answer, admitted that the so-called Florida Mutual Fire Insurance Association was not an incorporated company, that there existed only a partnership as charged in the bill. It surely will not be contended that if A, B & C conduct a business as a co-partnership and assume a corporate name that a party seeking to enforce a demand against the copartners should first be required to proceed by *quo warranto* to have the fact judicially determined as to whether there is or not a legal corporation when the fact is notorious that no such corporation has ever been chartered or organized.

Was the decree appealed from authorized by the law and

---

 Montgomery et al. v. Knox et al.—Argument of Counsel.
 

---

the facts? L. Montgomery and his associates (the defendants in the court below and appellants in this court) are to be regarded as partners, and the assets of the so-called Florida Mutual Fire Insurance Association as the assets of the partnership. From the allegations and charges in the bill and the schedule of the property in the possession of and owned by the said Association, it will be observed that the partnership was insolvent; that only one of the partners (Montgomery) owned any property, and that he was disposing of it; that if the complainants succeeded in establishing the liability of the defendants to them that their victory would be a fruitless one without the intervention of the court in appointing a receiver, &c.; that before judgment could be obtained by ordinary process of law that the property would be placed beyond reach of execution, therefore to deprive the complainants of the relief prayed for would result in a denial of justice. If the complainants have a right as against the defendants they have a remedy and only in a court of equity by appointment of receiver &c., would their remedy be complete. See cases of *Levy vs. Levy*, 6 Abb., (N. Y.) p. 89; 15 How. Pr., 395.

In the case of *Gregory vs. Gregory*, 33 N. Y. Sup. Ct., 1, it was held that insolvency would warrant the appointment of a receiver when it appeared that the plaintiff had a cause of action against the defendants, and that there was a probability of recovery, and that the benefit from such recovery would be either wholly lost or substantially impaired by reason of said insolvency if a receiver is not appointed. As a general rule a receiver will be appointed in all cases where the interest of the parties seems to require it. *Crane vs. McCoy*, 1 Bond, 422.

The appointment of a receiver is a matter resting in the discretion of a court of equity. *Frisbee & Johnson vs. Thomas*, 12 Fla., 300; *Railroad Company vs. Soutter*,

---

---

Montgomery et al. v. Knox et al.—Opinion of Court.

---

---

**W**all., 521; Crane vs. McCoy, 1 Bond, 422; Verplanck vs. Caines, 1 Johns, ch. 57; Lattimer vs. Lord, 4 E. D. Smith, 183; Chicago, &c., R. R. Co. vs U. S. Co., 57 Pa. St., 83; Johns vs. Johns, 23 Ga., 31; Johns vs. Dougherty, 10 Ga., 274; Bloodgood vs. Clark, 4 Paige, 574.

It was not error to appoint a receiver upon *ex parte* application without notice. This court laid down the correct doctrine in the case of Swepson *et al.* vs. Call and Baker, 13 Fla., 327, in this language: "The general rule is that an application for a writ of injunction, or for the appointment of a receiver, must be upon notice to the opposing parties; yet if the act to be prohibited be such that delay will be productive of serious damage the writ will be granted or a receiver appointed *ex parte*. The emergency must be judged of by the Chancellor in the exercise of a discreet judgment.

Justice Westcott, who delivered the opinion of the court in the case of West vs. Chasten, 12 Fla., 332, said: "As to the want of notice of application for an injunction, there are many causes in which the giving of notice would destroy its effective power and efficiency, and it would be the means often of augmenting the very wrong which it is invoked to prevent." The same doctrine was held in the case of Williams vs. Jenkins, 11 Ga., 595.

We submit that this case is one in which the giving of notice would have destroyed the effective power and efficiency of the remedy invoked, and would have been the means of augmenting the wrong complained of, and therefore the receiver was properly appointed upon *ex parte* application.

**MR. JUSTICE WESTCOTT** delivered the opinion of the court.

The principal difficulty in this case is to ascertain its pre-

---

 Montgomery et al. v. Knox et al.—Opinion of Court.
 

---

cise character as presented by the bill. The plaintiffs throughout their bill repudiate the idea that the Florida Mutual Fire Insurance Association is a corporation. They expressly and repeatedly aver that the defendants, Montgomery, Miller, Means and Keep and their agents in representing that such a corporation existed made a false representation and deceived them to their damage. The case, therefore, must be treated as one in which no such corporate existence is alleged or claimed.

Again, if the Association named was not a corporation, if this is the result of the allegations of the bill, then as a simple company nothing more than the incidents of an ordinary partnership would exist between these plaintiffs and the defendants named. Of this partnership or company plaintiffs themselves would be members to the same extent that the defendants were and their rights and liabilities would be fixed by their contract. In this aspect of the case the demurrer would lie if for no other reason, because it is apparent upon the face of the bill and exhibits that only certain of the partners, clothed with particular powers, are made parties. The general rule is that all the members of a partnership must be parties plaintiff or defendant. The plaintiffs here have not the power to sue this unincorporated association if it be such, by making only particular officers of the association parties.

We think, however, that this must be treated as a suit by the plaintiffs against the defendants, Montgomery and others, for damage resulting from a false representation by them. If the facts existing or alleged here constitute any cause of action it is personal against these individuals and remedy is at law. As a matter of course we do not decide that they have any such cause of action. This is a question for the court of law to determine when the matter is brought before that tribunal for adjudication. We simply



---

---

Anderson v. The State of Florida—Syllabus.

---

---

**say** that whether they have any cause of action against **these** defendants for damages resulting from this alleged **false** representation or not it is in no event ground upon **which** a receiver should be appointed to take charge of the **effects** and continue the business of "The Florida Mutual **Fire Insurance Association**" for any purpose in a suit in **equity** where no such corporation or the members of no such **association** are made parties.

For the reasons given we are constrained to reverse the **decree** and to dismiss the bill without prejudice generally to such proceedings as the plaintiffs may see proper to **institute** at law against the named defendants, or in equity **against** such association either as a corporation or an **association**.

---

**AUGUSTUS F. ANDERSON, PLAINTIFF IN ERROR, VS. THE  
STATE OF FLORIDA, DEFENDANT IN ERROR.**

---

---

1. An indictment must be found within the time limited by statute, or the offence charged therein will be barred.
2. An indictment was found at the spring term of the court, held in April, 1882, alleging that the defendant had committed an offence, not punishable with death, on or about the first day of March, 1880: *Held*, That the offence was barred by the statute: the judgment arrested and the defendant discharged.

Writ of Error to the Circuit Court for Wakulla county.

The facts of the case are stated in the opinion.

*D. S. Walker, Jr.*, for Plaintiff in Error. ,

*The Attorney-General* for Defendant in Error.

---

 Anderson v. The State of Florida—Opinion of Court.
 

---

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

At the Spring Term of the Circuit Court held in and ~~1~~ Wakulla county, in the Second Judicial Circuit, in the ~~ye~~ 1882, the plaintiff in error, Augustus F. Anderson, was ~~i~~ indicted for that "he heretofore, to wit: on or about the ~~fu~~ day of March, A. D., 1880, with force and arms, at and ~~and~~ the county of Wakulla aforesaid, feloniously, wilfully, ~~fra~~ dulently did alter and change the mark of an animal, wit: a cow, of the value of ten dollars, of the goods ~~an~~ chattels of one James Gibbins, with intent of the said ~~A~~ Augustus F. Anderson to claim said animal as his own, ~~a~~ to deprive its said owner thereof, against the form of ~~t~~ statute," &c. This indictment is signed simply "Wm. ~~i~~ Byrd," and is indorsed, among other endorsemen~~t~~ "Filed in open court this—— day of April, A. D. 1882.

"WM. P. BYRD,

"Acting State's Attorney."

The spring term of the Circuit Court at which this ~~i~~ indictment was found was held in the month of April, 188~~2~~. The defendant was tried at that term and found ~~guil~~ty. Counsel for defendant moved in arrest of judgment ~~up~~ on the ground that the grand and petit jurors at the term of the court at which the indictment was found, were ~~unla~~ fully drawn in this, that there was no sheriff in and ~~in~~ the county of Wakulla at the time of drawing said jurors. The court denied the motion and sentenced the defen~~ant~~ to six months at hard labor in the State penitenti~~a~~.

The defendant procured a writ of error and now mak~~es~~ the point that "the indictment shows that the offence which the defendant stands charged was not prosecut~~ed~~ within two years next after it is alleged in the indictme~~nt~~ to have been committed."

---

---

**Ernest v. The State of Florida—Syllabus.**

---

---

The statutes of this State provide that "offences not punishable with death shall be prosecuted within two years next after the same shall have been committed." McC. Dig., 435, §2. The indictment charges that this alleged offence was committed "on or about the first day of March, A. D. 1880." It was found at the spring term of the Circuit Court held in and for Wakulla county, and was filed in the court on \_\_\_\_\_ day of April, 1882. This shows conclusively that the indictment was not properly found and filed within two years next after it is, in the indictment, alleged that the offence was committed. *Savage vs. The State*, 18 Fla., 970; *Nelson vs. The State*, 17 Fla., 195; *United States vs. Ballard*, 3 McLean, 469.

The judgment is arrested and the defendant discharged.

---

**PETER ERNEST, PLAINTIFF IN ERROR, VS. THE STATE  
OF FLORIDA, DEFENDANT IN ERROR.**

1. "Premeditation" is defined as meaning, intent before the act, but not necessarily existing any extended time before the act. "Premeditated design," as used in the statute relating to homicide, means an intent to kill, design means "intent," and both words imply premeditation.
2. The question of premeditation is a question of fact and not of law, and like all other facts, it must be determined by the jury.
3. A charge to a jury, that "on the subject of malice or a premeditated design, I instruct you that when a killing is proved the law presumes that it was done from a premeditated design, unless it shall appear from the evidence, either on the part of the defence or the State that there was excuse or justification; and in the absence of explanation, the law implies malice, or a premeditated design from the use of a deadly weapon: *Held*, To be error.
4. It is not in cases of a doubt, created by the evidence, in the minds

---

---

Ernest v. The State of Florida—Opinion of Court.

---

---

of the jury, that they are to acquit a prisoner on trial, but must be a reasonable doubt, one conformable to reason, and which would satisfy a reasonable man. It is said to be, 'state of the case which, after the comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a certainty, of the truth of the charge.'

Writ of error to the Circuit Court for Leon county.

The facts of the case are stated in the opinion.

*John S. Beard* for Plaintiff in Error.

*The Attorney-General* for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the Court.

At the spring term of the Circuit Court held in and Leon county, in March, 1883, the plaintiff in error, **E** Ernest, was indicted for the murder of John, *alias* Perry. At the same term of the court, the defendant having been duly arraigned, plead not guilty, and was tried and found guilty.

The counsel for the defendant moved for a new trial which was denied by the court, and he brings his case on writ of error.

The errors assigned are as follows:

The court erred in charging the jury:

1st. "If you believe from the evidence that at the time and place mentioned in the indictment the defendant lawfully killed the deceased from a premeditated design to effect his death, and such killing was done at a time and under such circumstances, when the defendant had no reasonable grounds to apprehend a design on the part of the deceased to commit a felony or do defendant some great

---

---

Ernest v. The State of Florida—Opinion of Court.

---

---

sonal injury, and there was imminent danger of such design being accomplished, you should find defendant guilty of murder in the first degree.”

2d. “On the subject of malice or a premeditated design, I instruct you that when a killing is proved the law presumes that it was done from a premeditated design, unless it shall appear from the evidence, either on the part of the defence or of the State, that there was excuse or justification, and in the absence of explanation the law implies malice or a premeditated design from the use of a deadly weapon.”

To such charge of the court the defendant excepted.

The court erred in refusing to charge the jury as requested by the defendant’s counsel, as follows, to which refusal thus to charge the counsel for defendant excepted.

1st. That the *corpus delicti* must be proved, *i. e.* the body of the offence, the substance of the crime, the substantial and fundamental fact of the commission of the crime, which includes in law that the effect proved is the necessary consequence of the cause charged in the indictment. In this particular case that the deceased died from the effect charged in the indictment; if the jury have any doubt upon this point, that it is their duty to acquit.

2d. If the jury have any doubt as to the immediate cause of death, it is their duty to acquit. It is a peculiarity of the disease, from which it appears by the evidence was the immediate cause of the death of the deceased, viz: tetanus or Lockjaw, that it is often spontaneous or idiopathic, having no assignable cause for its appearance, and that it is often the effect of slight and imperceptible causes, and if the jury think that it could have in this case been spontaneous or idiopathic, the cause of exposure, or from any cause disconnected with the wound in the neck, it is their duty to acquit. If they believe the tetanus or lockjaw to

---

---

Ernest v. The State of Florida—Opinion of Court.

---

---

have been caused by any wound other than the one in the neck, or if they have a reasonable doubt upon any of the points, it is their duty to acquit.

3d. If from the evidence they have a reasonable doubt as to the prisoner having inflicted the wound in the neck it is their duty to acquit. The prisoner is entitled to the benefit of every reasonable doubt.

The counsel for the defendant further insists that the court erred in refusing to grant the motion for a new trial upon the following grounds:

1st. The verdict is contrary to law.

2d. The verdict is contrary to the evidence.

3d. Discovery of new and material evidence.

4th. The Judge's charge was contrary to law.

There is nothing in the record to show that there had been any proof before the court of "new and material evidence" to be introduced on the part of the defendant. The record is entirely silent upon this question and it cannot therefore be considered here.

The statutes of our State upon the subject of homicide provide as follows:

"SECTION 1. The killing of a human being without the authority of law, by poison, shooting, stabbing or any other means, or in any other manner, is either murder, manslaughter or excusable or justifiable homicide, according to the facts and circumstances of each case.

"SEC. 2. Such killing, when perpetrated from a premeditated design to effect the death of the person killed, or any human being, shall be murder in the first degree, and the person who shall be convicted of the same shall suffer the punishment of death. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual,

---

---

Ernest v. The State of Florida—Opinion of Court.

---

---

**it** shall be murder in the second degree, and shall be punished by imprisonment in the State Penitentiary for life. **When** perpetrated without any design to effect death, by a **person** engaged in the commission of any felony, it shall be **murder** in the third degree, &c.

“**SEC. 4.** The killing of one human being by the act, procurement or omission of another, in cases where such **killing** shall not be murder, according to the provisions of **this** Chapter, is either justifiable or excusable homicide, or **manslaughter.**” Chap. 1637, Laws 1868; McClellan’s Digest, p. 350.

We can discover no error in the charge of the court as set out in the first alleged error in the defendant’s assignment. That clause so excepted to is complete in itself and covers the entire question of murder in the first degree. The Judge says: “If you believe from the evidence that at the time and place mentioned in the indictment the defendant unlawfully killed the deceased from a premeditated design to effect his death, the defendant not having reason to apprehend a design on the part of deceased to commit a felony, or do defendant great personal injury, then the jury should find the defendant guilty of murder in the first degree.”

This charge is clearly within the definition of murder in the first degree as found in the second section of the statute above cited, and in it there is no error.

The second clause of the charge of the court so excepted to, viz: “On the subject of malice or a premeditated design I instruct you that when a killing is proved the law presumes that it was done from a premeditated design, unless it shall appear from the evidence, either on the part of the defence or the State, that there was excuse of justification, and in the absence of explanation the law implies malice or a premeditated design from the use of a deadly weapon,”

---

---

Ernest v. The State of Florida—Opinion of Court.

---

---

we think is clearly error. The word "malice" is not found in our statutes relating to homicide. Premeditation is defined as meaning intent before the act, but not necessarily an intent existing any extended time before the act. "Premeditated design," as used in the statute, means an intent to kill, design means intent, and both words imply premeditation.

In the case of Dukes vs. The State, 14 Fla., 499, the court in discussing this question uses this language: "every homicide shall be presumed to be murder until the perpetrator show that the act is not murder this emasculates the statute; for the design of the statute is to require that the degree or quality of crime shall be established by the proofs. The common law says the killing is murder the statute says the *unlawful* killing is murder, manslaughter or not criminal at all, according to the facts and circumstances. And so it is to be ascertained from *all the* facts and circumstances whether any crime has been committed, and it cannot therefore be allowed that a man shall be adjudged guilty of the highest crime upon proof of *only* one of the ingredients, the single fact of killing being *but* one ingredient of the crime. \* \* \* \* The *degree* of crime, the *quality* of the act, must under this statute be determined, not alone upon a general presumption from *an act* but upon the application of reason and judgment to *all the* facts proved, and thus to determine with what mind *and* intent the act was committed. It is not assumed that *all* premeditations must be ignored, or that no *presumptions* can be invoked in establishing the criminal intent, but *only* that under this statute the presumption must be one of *fact*, to be drawn by the jury from the proof of the *circumstances* attending the homicide, and not from the homicide alone. The principle involved is that all presumptions *are* in favor of innocence, and that the animus must be inferred



---

---

Ernest v. The State of Florida—Opinion of Court.

---

---

from the manner of the commission of the act and the conduct of the accused and other circumstances of the case.

In the case of *Savage and James vs. The State*, 18 Fla., 909, this court says: "The question of premeditation is one of fact, like all other facts, to be determined by the jury. If the killing was done with premeditation it would be murder in the first degree. If such premeditation in fact preceded the act it gave character to the crime, but it was for the jury and not the court to determine this question. It is not a question of law for the court but a question of fact for the jury. This fact in this case was not submitted by the court, but was by it expressly determined in its charge.

The evidence in this case showed that the deceased came to his death by tetanus or lockjaw caused from a wound in the neck, the wound having been made by the defendant with a razor. That there are two kinds of tetanus, traumatic, which is caused by wounds, and the idiopathic, which comes from exposure to the cold, or wet, or it may be spontaneous without any assignable cause. The deceased had an incised wound in his neck. That punctured wounds in the extremities are more apt to cause tetanus than incised wounds in the neck, head or breast. That it is not unlikely tetanus should come from small and imperceptible wounds, punctured wounds in the head or foot. That deceased was a very imprudent patient. That if he had not been so imprudent he probably would not have had tetanus. He came out two days before his death, contrary to the positive instructions of his physicians. The physician who attended him says: "I think that the wound in the neck was the cause of tetanus." In view of such evidence it was right and proper that the court should have charged the jury upon the points as developed by the evidence. The substance of the matter proposed by the counsel of the

---

---

Ernest v. The State of Florida—Opinion of Court.

---

---

defence was eminently proper. The form, however, in which they are propounded may be obnoxious to criticism. It is not in cases where there is a simple doubt that juries are to acquit, but it must be a "reasonable doubt," that is conformable to reason, a doubt which would satisfy a reasonable man. "It does not mean a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." *The State of Nevada vs. VanWinkle*, 6 Nev., 340.

The second clause above referred to requests the court to charge that "if the jury think that it (tetanus) could have in this case been spontaneous, or idiopathic, the cause of exposure, or from any cause disconnected with the wound in the neck, it is their duty to acquit."

This request is clearly wrong. It is not enough that it *could* have been spontaneous. The evidence shows it "could have been," but was it in fact idiopathic, and occasioned by some cause disconnected with the wound in the neck? The court very properly overruled the request in the form in which it was made.

The third request of the defendant's counsel to charge that, "if from the evidence they have a reasonable doubt as to the prisoner having inflicted this wound in the neck, it is their duty to acquit. The prisoner is entitled to the benefit of every reasonable doubt," seems to us to be right and the court should have so charged.

The defendant is presumed innocent until proven guilty. The presumption is in favor of the defendant, and the State

---

---

Williams v. The State of Florida—Statement of Case.

---

---

**must** satisfy the jury of the guilt of the defendant, beyond **the** effect of a reasonable doubt.

The judgment is reversed and a new trial ordered.

---

**BILL WILLIAMS, PLAINTIFF IN ERROR, VS. THE STATE OF  
FLORIDA, DEFENDANT IN ERROR.**

1. Under the laws of this State, Judges of the Circuit Courts are authorized to allow writs of error to issue in cases of misdemeanors, and crimes not capital, as well as in capital cases.
2. When the record contains all the evidence introduced in the case, and upon a careful examination it is clear it does not warrant the finding of the jury, this court will reverse the judgment.

Writ of error to the Circuit Court for Alachua county,  
Judge Vann of the Third Circuit presiding.

The facts of the case except the testimony are stated in **the** opinion.

The testimony as it appears in the bill of exceptions is **as** follows:

The State, to maintain the issues on its part, produced as a witness one Mrs. Laura Britt, who being sworn testified **as** follows: The prisoner came to my house and said he had not seen us for a long time, and thought he would stop awhile. My husband was not at home; I was alone with my children and a little colored boy named Thomas; I don't remember the month, or day of the month; I don't know what county it was in; the prisoner said he would like to have something to eat; I told him I had nothing cooked but some cold bread; he said that would do; I then sent my children, and a little colored boy staying on

---

---

Williams v. The State of Florida—Statement of Case.

---

---

the place into the woods to get some wood; the wood they went to to get the wood was twenty or thirty yard in front of the house; the prisoner took a chair and set down under the window eating the bread I gave him, while I was in the house; in a little while my little girl came back crying and said that her little brother would not let her have her wood that she had gathered; the prisoner told her not to cry, but come with him and he would get her a nice little armful of wood. My daughter, Armadella, is about seven years old; the prisoner picked her up in his arms and went off to the woods about two or three hundred yards away; (my recollection is that the place where the children went to get the wood, where they first met Bill Williams, was in front of the house, some twenty or thirty yards, and that when Bill took the little girl he carried her in a different direction altogether, and when seen by Thomas, buttoning up her drawers, he was four or five hundred yards off.—W. A. HOCKER.) When the rest of the children had gone for wood, my little boy came running back in a little while to the house and said I had better run after Bill, (that is the prisoner's name,) for he might drown his sister in the pond down there. I became frightened and went running and screaming in the direction the prisoner had gone; I came to where the prisoner was in a few moments; the prisoner was walking along by the edge of a pond, leading my little girl by the hand; she was not crying; she was walking along quietly with the prisoner, holding his hand; I took my little girl and carried her to the house; she did not seem to have been crying nor scared; in a little while the prisoner came back to the gate and called me; I told him I did not want to see him; he then went off quietly away. The prisoner is recognized as being a good and harmless man in the community which he lives; I have known nothing bad about him

---

---

Williams v. The State of Florida—Statement of Case.

---

---

fore, and we have known him a good while; he had been to our house often before, and the children all liked him, as he used to play with them and amuse them; he was counted a good carpenter and a working man; when I went home I examined my little girl and found she was bruised in her private parts; her thighs and the back part of her legs were all black and blue; I don't know whether the prisoner did the bruising or not; I don't know how it was done.

The witness was first asked about the obligations of an oath and testified that he knew if he testified falsely he should be punished for it, and this was the witness who, if I am not entirely at fault, testified that the route taken by Bill in leading the little girl, Armadella, was not the one which the children went to get the wood. [I understand this to be also an amendment by Mr. Hocker, the State Attorney, of the testimony as proposed for the bill of exceptions.—REPORTER.]

Thomas Johnson, the second witness on behalf of the State, testified as follows:

I know Bill Williams (the prisoner); he came to Mr. Britt's one day, and me and Mr. Britt's little boy and girl went in the woods to get some wood; the little girl went back to the house crying because her little brother took her wood away from her. In a little while Bill came to where we were with the little girl in his arms; she wanted to get down when they got to here we were and Bill put her down, and she walked on with him holding his hand, and Bill told her he would get her a nice little turn of wood, and they went walking on to the woods; her brother run to the house and told his mother that she had better watch Bill; his mother came running down to where we were screaming, and I run in the direction Bill had gone; I soon came to where him and the girl was; the dog barked

---

---

Williams v. The State of Florida—Statement of Case.

---

---

and Bill got up from behind a log and sat down on the log; the little girl was standing up beside him quietly as he was buttoning the little girl's drawers up; I was a little ways off; the little girl was not crying; I did not hear her cry any time, and she did not seem to be scared; her mother took the girl to the house; Bill went on around the pond; I found Bill almost five hundred yards from the house; I am nearly thirteen years old.

Mr. Britt, (this witness testified that the place where the offence charged in the indictment was committed in the county of Alachua, and State of Florida, and he also testified as to the time which, as I have no copy of the indictment, I have forgotten—W. A. H.) the third witness on behalf of the State, testified as follows:

I was away from home when this thing happened; I was at Flemington; when I came back on Monday my wife told me what had happened; she asked me to examine the little girl, I told her I did not like to, but that I could; I examined her and she was bruised about her thighs and back of her legs; the offence for which the prisoner is being tried occurred on Saturday before the Monday on which I examined her. The place where my house is is in Alachua county and State of Florida. The prisoner is recognized as being a good working man and a well behaved man in the community in which he lives. I have never known him to do anything mean before. He has often been to my house and played with the children and they all liked him.

Mr. B. H. Kendrick, the fourth and last witness on behalf of the State, testified as follows:

I am acting deputy sheriff at Micanopy, in this county. I went in search of Bill Williams; I had a writ for him several days after the alleged offence, and I found him in the woods squatting down in some bushes on the edge

---

---

Williams v. The State of Florida—Opinion of Court.

---

---

a hammock; he had a gun leaning up near him by a tree, and as I rode up he got up and picked up his gun; I rushed upon him with my horse and leveled my pistol at him and told him what I was after, and he quietly gave up his gun and went along with me; he made no attempt to shoot.

*Taylor & Sanchez and Ashby & Thrasher* for Plaintiff in Error.

*The Attorney-General* for Defendant in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court:

At the January Term of the Circuit Court, held in and for the county of Alachua, in the month of January, A. D. 1883, the plaintiff in error, Bill Williams, was indicted. Such indictment charged that the plaintiff in error, "on the ninth day of October, in the year of our Lord one thousand eight hundred and eighty-two, with force and arms, in the county of Alachua aforesaid, in and upon one A. B., a female, feloniously and wilfully did make an assault with intent her, the said A. B., then and there feloniously to ravish," &c.

The defendant plead not guilty, and was tried at the same term of the court and was found guilty.

The counsel for the defendant then made a motion for a new trial, upon the ground that the verdict was contrary to the evidence, the law and the charge of the court. The court overruled his motion for a new trial, and the counsel for the defendant duly excepted to such ruling of the court.

The defendant was sentenced to ten years imprisonment at hard labor in the State Prison.

---

---

Williams v. The State of Florida—Opinion of Court.

---

---

The Judge of the Circuit Court granted a writ of error and the same is now here in pursuance of such writ.

The errors assigned are as follows:

“Because the verdict of the jury was contrary to the evidence and the weight of the evidence.

“Because there was no evidence upon which the verdict of the jury can be sustained.”

The Attorney-General moved here to dismiss the writ of error, for the reason that, not being a capital case, the Judge of the Circuit Court had no power or authority under the statutes to grant the same. [The Attorney-General announced at the bar it was merely his purpose to have the practice settled, and that if the motion was granted a writ of error might issue here returnable *instantly*.—REPORTER

Chapter 1104, Laws 1861, provides “that hereafter writs of error in capital cases in the Circuit Courts of this State shall be allowed only in the manner and upon the terms provided now by law for writs of error in cases of misdemeanors and crimes not capital: *Provided, however*, That the Judges of the several Circuit Courts shall have the same power in allowing or directing writs of error to issue in such cases as the Justices of the Supreme Court have.”

Section 2, Chapter 1561, Laws 1866, reads as follows: “*Be it further enacted*, That the Judges of the Circuit Courts be, and they are hereby empowered to issue writs of error, mandamus and *quo warranto* in vacation, as well as in term time.”

We are of the opinion that it was the intention of the Legislature enacting these laws to enlarge the powers of the Judges of the Circuit Court, and to authorize them to allow writs of error, in cases of “misdemeanor, and crimes not capital,” as well as in capital cases. The words “such cases” in the proviso of Chapter 1104, referring to all the



---

---

Williams v. The State of Florida—Opinion of Court.

---

---

cases mentioned in the former part of the section, we can certainly see no objection to thus extending the authority of such Judges. Section 2 of Chapter 1561 places no restriction upon such Judges. They are authorized to “issue writs of error, mandamus and *quo warranto* in the vacation, as well as in term time.”

The motion to dismiss this writ of error upon that ground is denied.

The record shows that four witnesses were called, and examined upon the part of the State to prove the alleged offences; none were introduced upon the part of the defendant. We have carefully and critically examined this evidence, embodied in the record, and fail to find in it anything to warrant the verdict of the jury, not even sufficient to warrant a verdict of simple assault, much less a verdict of assault with intent to commit the heinous crime charged in the indictment.

As a general rule this court will not interfere with the verdict of a jury when there is evidence before them which will justify their finding, but in a case of this character, where the penalty is so severe under our statute, there should be at least some evidence of guilt to warrant the sentence of the law. *Snowden vs. The State*, 17 Fla., 386; *Green vs. The State*, 17 Fla., 671.

Judgment reversed and new trial awarded.

,

.

.

.

\_\_\_\_\_

Decisions  
OF THE  
Supreme Court of Florida,

---

JANUARY TERM, A. D. 1884,

---

**THE** STATE OF FLORIDA, EX REL. JOHN CHESTNUT, VS.  
THOMAS F. KING, CIRCUIT JUDGE, RESPONDENT.

**The** last clause of Section 7 of Chapter 3248, an act to provide summary proceedings against delinquent tenants, approved February 16, 1881, which provides that on an appeal from the judgment of the County Judge the Circuit Court shall try the case *de novo*, is inoperative. By the eleventh section of Article 6 of the Constitution the power of the Circuit Court in such cases is appellate only, and an appeal, in the absence of a statute regulating the proceeding, gives the Circuit Court only such power as it would have by a common law writ of error. The act in other respects appears to be valid.

**The** facts of the case are stated in the opinion.

**Taylor & Sanchez** for Relator.

**THE** CHIEF-JUSTICE delivered the opinion of the court.

**Relator** procured an alternative writ of mandamus directed to Judge King, commanding him to show cause



The State of Florida ex rel. v. King—Opinion of Court.

why he should not be required to try *de novo* a cause ~~appealed~~ appealed from a County Judge under "an act to provide summary proceedings against delinquent tenants," approved February 16, 1881, Chapter 3248.

A proceeding had been had under that act against relator resulting in a verdict and judgment against him, and he appealed to the Circuit Court. The cause was regularly docketed in that court and relator demanded a trial as provided by Section 7 of the act, the last clause of which reads: "an appeal so taken shall operate as a supersedeas, and the cause shall be tried *de novo* in the Appellate Court." The court declined to try the cause "*de novo*" (by which we understand the court refused a trial by jury or by hearing evidence anew as in a case of original jurisdiction,) and afterwards dismissed the appeal and remanded the cause to the County Judge. This is a brief statement of the case as shown by the relator.

The return of the Judge substantially admits that this statement is correct with the exception that before dismissing the appeal he gave the parties to understand that he would consider the proceedings in the case if properly certified by the County Judge; that the papers filed were detached papers with no intelligible narrative of the proceedings. That afterwards appellants filed what purported to be a bill of exception signed by the County Judge, but as there was no evidence that the plaintiff had any notice of settling the bill of exceptions, he refused to consider any alleged errors and dismissed the appeal.

It is insisted by relator's counsel that because the Circuit Courts, by the Constitution, have original jurisdiction of actions of forcible entry and unlawful detainer, and all actions involving the title and right of possession of real estate, they should try such causes though brought up by appeal. But Section 11 of Article 6, relating to County

---

---

The State of Florida ex rel. v. King—Opinion of Court.

---

---

Courts and Judges, reads thus: "They may have also jurisdiction of such proceedings relating to the forcible entry or unlawful detention of lands and tenements, subject to the *appellate* jurisdiction of the Circuit Courts, as may be provided by law." And so, although the Circuit Court has original jurisdiction of such proceedings, its power in cases appealed from the County Judge is *appellate* only, and we have held in other cases that where appellate jurisdiction only is given the court cannot exercise original jurisdiction. *State vs. Baker*, 19 Fla., 19, and *State vs. Vann.*, *ib.*, 29. We think those cases were correctly decided. The appeal in such cases carries the cause to the Circuit Court to be disposed of in the exercise of its appellate and not its original powers. The appeal in the absence of any statutory regulation of the method or of the extent of the exercise of the power of review by the Circuit Court has the effect of a common law writ of error, and transfers the cause to that court for the purpose of determining whether the lower court has kept within its jurisdiction and its statutory powers, whether it had jurisdiction of the subject matter and of the parties, and whether its judgment is such as it had power to render, all of which must be judged of by the return made on the appeal of the proceedings had before the County Judge.

With these views we determine that the respondent well refused to try the cause anew, the provision that the case shall be tried *de novo* being unauthorized by the Constitution.

The return of the respondent suggests the question whether the act conferring upon County Judges the power to try cases of this character is Constitutional. The Legislature is certainly authorized by Section 11, of Article 6, to confer on County Judges the power to try "proceedings relating to the forcible entry or unlawful detention of lands."

---

The State of Florida ex rel. v. Trustees I. I. Fund—Syllabus.

---

The act in question gives jurisdiction of causes where tenants hold over after the expiration of their time without permission, and also after default in payment of rent. Such holding over is "unlawful detention," within the meaning of the words used in the Constitution.

The writ is quashed with costs against relator.

---

THE STATE OF FLORIDA, EX REL. THOMAS K. DIXON, **vs.**  
THE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND,  
RESPONDENTS.

1. A paid to the Salesman of the Trustees of the Internal Improvement Fund the price of a parcel of land and received a certificate of sale stating that a deed would be made and delivered to the purchaser, which certificate was under the seal of the State Land Office. The certificate was recorded in the Clerk's office of the proper county. Afterwards the Trustees conveyed the land by deed to B. On the application of A for a writ of mandamus to compel the Trustees to issue to him a deed in pursuance of the certificate, it is held, that as they had conveyed to B, no title remained in them and they could give none to A.
2. Registration is notice to subsequent purchasers, but does not affect the grantor.
3. Though mandamus may be a proper proceeding to compel the Trustees to make a deed in pursuance of their agreement, yet when they have conveyed to another, notwithstanding the contract, the grantee has legal title which cannot be impaired or affected by a mandamus proceeding in which he is not a party, and the writ will be refused. The real controversy in such case is between the purchasers.

The Governor, Comptroller, Treasurer, Commissioner of Lands and Immigration and the Attorney-General are *ex-officio* Trustees of the Internal Improvement Fund of the State of Florida.

---

**The State of Florida ex rel. v. Trustees I. I. Fund—Opinion of Court.**

---

**The other facts of the case are stated in the opinion.**

*Augustus W. Cockrell* for Relator.

*George P. Raney* for Respondents.

**THE CHIEF-JUSTICE** delivered the opinion of the court.

**Relator** on the 22d day of August, 1882, made payment **at the office of the Commissioner of Lands and Immigration for forty-three acres of land belonging to the Internal Improvement Fund, in Brevard county, and received from the Commissioner and Salesman a certificate acknowledging such payment and stating that “a deed conveying said lands to the said Thomas K. Dixon will be issued as soon as the same is signed by the Trustees of the Internal Improvement Fund,” sealed with the seal of the State Land Office and signed by the Commissioner. This certificate was recorded in the Clerk’s office in Brevard county August 26, 1882.**

**Relator avers that the Trustees refuse to execute the deed according to the contract, and prays a mandamus to compel the Trustees to give him a deed. An alternative writ was issued.**

**The Trustees make return that on the 23d day of June, 1883, by a deed in due form, they granted, bargained, sold and conveyed the same land to Mary E. Titus, of Brevard county.**

**Thereupon relator moves the court that a peremptory writ be issued. This is equivalent to a demurrer to the return.**

**We assume for the purposes of this case that mandamus is the proper remedy to compel the Trustees to convey land held by them, as such Trustees, which they had agreed to convey and for which they have received payment. Until**

---

The State of Florida ex rel. v. Trustees I. I. Fund—Opinion of Court

---

they execute a deed on conveyance the legal title remains them, and as between them and the bargainee they hold such legal title in trust for him as the equitable owner. The Trustees are public officers, and among their duties under the law is that of executing conveyances of the lands held by them for sale and sold to purchasers.

In this case they bargained the land to Dixon, but afterwards conveyed the legal title to Mrs. Titus. Now the plaintiff seeks to compel them to convey the legal title to him. But they have no title to convey. Both the legal and the equitable title have gone out of them to Mrs. Titus. There can be no plainer proposition than that they cannot grant what they have not, and of which they have no control. Nothing remains in them to convey.

The courts will refuse to interfere by mandamus when it is apparent that the interests of third parties not before the court are involved. In *Houghton Co. vs. Com'r of Land Office*, 23 Mich., 270, there was an application for a mandamus to compel the Commissioners to cause patents to be issued to the county for certain selections of swamp lands appropriated to the county for the construction of a road. The County Supervisors having made selections under the law and the land officers made return that some of the lands selected had been sold to individuals, among them one Loring, the court say: "We do not feel at liberty to try his (Loring's) rights in the present proceeding, or to order the issuing of another patent; nor are we satisfied that we could, in this proceeding, invalidate the prior patent, nor that this can be done in any way except by *scire facias* for that special purpose, or, perhaps, by bill in chancery."

Says the court in *Tabor vs. The Com'rs of the General Land Office*, 29 Texas, 521: "If there were no other objection to the application for the writ of mandamus in the



---

**The State of Florida ex rel. v. Trustees I. I. Fund—Opinion of Court.**

---

**case**, the fact that there are other claimants to the land, **who** are not parties to this proceeding, would furnish **grounds** for refusing it. The averment that their claims **are** void will not relieve the matter of the difficulty; for **this** court will not undertake to adjudicate their claims, **whether** valid or not, when the claimants are not parties **to** the suit." See also *Com'rs vs. Smith*, 5 Texas, 484; *Smith vs. Power*, 2 Texas, 57; *Bracken vs. Wells*, 3 Tex., 91; *Queen vs. Powell*, 1 Ad. & E., (N. S.) 351, 360.

"A mandamus will not be granted when it is reasonable **to** presume that there are persons at the time in possession **under** another title and who therefore should have an **opportunity** to defend it. (This was a case of mandamus **to** the Com'r of the Land Office.) The relator has mistaken **his** remedy, for if his title under the certificate is valid, and **presents** a superior equity over the opposing title, as in the **case** of *Lyttle et al. vs. The State of Arkansas*, 9 How., 315 and *Lindsay vs. Hawes*, 2 Black., 554, the appropriate **remedy** is by bill in equity." *U. S. vs. The Commissioner*, 5 Wall., 563.

The case of *Smithee, Commissioner of State Lands vs. Moseley*, 31 Ark., 425, was very like the present. One **Parnell** bought land from the State and paid for it in 1861, and Parnell sold and conveyed to Moseley. In 1872 the **Commissioner** of State Lands again sold to Smith and **Renfrow** and patents were issued to them in 1874. The court **on** application for a mandamus to the Commissioners **says**: "The State, in making the patents to Renfrow & Smith, whether rightly or not, parted with her title, and **now** has nothing to grant. If, in the purchase of the land in 1861, Parnell acquired such a right to the land as entitled him to a patent for it, a court of equity would, in a **suit** by him against the party holding the legal title under the **patent**, declare him as holding it in trust for him, and

---

---

The State of Florida ex rel. v. Trustees I. I. Fund—Opinion of Court.

---

---

direct a conveyance thereof to him. As there can be no decision upon the title where the party claiming under the patents is not before the court, the issuance of another patent to the appellee, would be a nugatory and void act.

Relator insists that because his certificate of purchase was recorded in the office of the Clerk of Brevard county before the conveyance to Mrs. Titus was executed, she is chargeable with notice of his purchase and therefore the deed not having been made to a *bona fide* purchaser without notice conveyed no title to her as against him, and they have not deprived themselves of the power to give him a title.

We cannot conceive what effect the registration of the certificate, or other notice thereof to Mrs. Titus, can have upon the action of the Trustees, or how the effect of their deed to her is nullified by such notice without judicial action upon it. If Mrs. Titus, without any superior legal or equitable right, has purchased this land and obtained a deed with notice of relator's prior equities, it may be that a court of equity will, upon bill filed for that purpose, set aside and annul her legal title and thus remove the obstacle which now prevents him from obtaining a patent; or by decree declare that she holds in trust for him and direct her to convey to him. We have never understood that the recording of a deed or paper was intended to be *notice to the grantor*.

Relator says: "Looking to the intention and object of the Legislature in passing Chapter 3127, it was designed to protect the holder of a duly recorded certificate from any subsequent sale of the Trustees, by declaring invalid such subsequent title, as against the holder of a prior duly recorded certificate of sale, and thus strip the Trustees of the power to make a subsequent sale."

We understand the effect of registration is that it is evi-

---

---

The State of Florida ex rel. v. Brown—Statement of Case.

---

---

dence of notice to a subsequent purchaser in a controversy between grantees. The very suggestion indicates that the subsequent purchaser must be a party to any proceeding seeking to invalidate or affect his legal title. The Supreme Court of the United States and the courts of all the States, so far as we are informed, agree that mandamus is not a proper proceeding in which to try conflicting titles to land, or conflicting claims of this character.

The motion for a peremptory writ is denied.

---

**THE STATE OF FLORIDA, EX REL. GEORGE W. MARKENS, VS.  
MOSES J. BROWN, COLLECTOR OF REVENUE, RESPONDENT.**

1. In testing the question whether an act of the Legislature was passed in conformity to the requirements of the Constitution, the Journals of the Houses of the Legislature will be examined; and if the Journals furnish conclusive evidence that any bill was not passed in a constitutional manner it cannot be recognized as a law.
2. The Journals of the Senate and Assembly for the year 1883 do not show that Chapter 3416, an act regulating the issuing of licenses to sell liquors, wines and beer, was not passed in accordance with the requirements of the Constitution, and it is considered a valid act.

Chapter 3416, of the Laws of Florida, approved March 3, 1883, and commonly, however inaccurately spoken of as “the Local Option Liquor Law” is the statute in question. The respondent is Collector of Revenue of Duval county. The other facts are stated in the opinion.

---

---

The State of Florida ex rel. v. Brown—Argument of Counsel.

---

---

*The Attorney-General* for the motion.

I. The motion to quash brings up the question of the validity of the act in question: Chapter 3416, Laws Florida.

If the Journals cannot be resorted to to ascertain whether or not the forms prescribed by the Constitution as to the enactment of laws have been followed, then this statute, enrolled, being signed by the proper officers of the Senate and Assembly, and approved by the Governor, the motion should be granted. The authorities holding that such a resort cannot be made are neither few nor wanting in respectability. Two, if not three States have, after adopting the view that such resort may be had, abandoned it for the contrary view as wiser and more in accord with the independence of the different departments of government. To hold that no such resort can be had, would remove all other difficulties from the way of granting my motion. I do not, however, ask the court to hold so, but leave it to them to decide which theory is the better. My own view is in favor of those cases holding that such resort can be had. The case of *In re Robert*, 5 Colorado, 525, gives the decisions on both sides, and there is a preponderance, though not so great as might be imagined, in favor of going behind the enrolled act.

II. There is I think but one material question in the case, viz: whether or not the 1st amendment made by the Senate and adopted by the Assembly, but omitted in making the enrollment, is of such character as that its omission affects the real meaning and substantial effect of the law. This question I leave for the third subdivision of this brief.

As to any other alleged defects, I can see nothing worth of comment. As to the point made that the Senate Journal does not show a suspension of the rules, for the second

---

---

The State of Florida ex rel. v. Brown—Argument of Counsel.

---

---

reading, see Cooley's Const. Limitations, p. 135, and the cases of McCulloch vs. State, 11 Ind., 424; Supervisors vs. People, 25 Ill., 181; Spangler vs. Jacoby, 14 Ill., 297, show that it is to be presumed that the rules were properly suspended, or the proper action taken, unless the Journals show the contrary, except in cases where the Constitution expressly provides that the Journal shall show it. Our Constitution does not expressly provide that the Journals shall show that the rules were suspended or waived as to reading a bill on three separate days. Sec's. 10 and 15, Art. 4.

III. The omission of the first amendment of the Senate does not avoid the act:

The amendment is immaterial, the act being of the same effect without it.

It is to the second section, and was as follows: "That the County Commissioners shall issue said license upon the presentation of said petition."

Section 2 shows that application for "the right to sell such liquors, wines or beer" is to be made to the County Commissioners by petition as therein prescribed. Section third prohibits the Collector of Revenue from issuing a license unless a permit is presented from the Board of County Commissioners—i. e., a permit granting the right to sell such liquors, wines or beer upon complying with the requirements of the General Revenue Law. The permit which he is required by section 3 to have is that which he applies for under section 2. There is no requirement for getting this permit, but those prescribed by section 2. The power to issue the permit, upon such requirements being complied with, exists without the amendment, and it would be the duty of the Commissioners to issue on presentation of the petition at the meeting held "to hear such petition." The amendment then would neither have given

---

---

The State of Florida ex rel. v. Brown—Argument of Counsel.

---

---

any more power, nor changed the duty of the Commissioners as to time of acting. Neither with or without the amendment could any reasonable delay be condemned. The amendment could not be construed as any limitation of the implied powers.

Authorities to show that its omission does not invalidate the statute:

In the case of *The People vs. The Supervisors of Onondaga*, 16 Mich., 254, the law in question was passed by both houses with a title authorizing the levying and collecting of a certain "*bounty* tax." In engrossing it after its passage, by a clerical error, the word "*county*" was substituted for "*bounty*," and the bill was submitted to and signed by the Governor with this mistake in the entitling. The court held, under a constitutional provision like the 14th Section of 4th Article of ours, that the title was an important part of the statute, but that the journals could be looked into to ascertain whether the statute passed with a proper title, and that the error being clerical was not fatal.

In *Jones vs. Hutchinson*, 43 Ala., 721, it is held that the insertion on enrollment of a material provision, varying the substance and legal effect of the bill renders the bill invalid, but Justice Judge says: "In making the copy of an engrossed bill for enrollment, a separate and distinct matter from the proposition of the original bill might be inserted and escape detection before the adjournment of the Legislature. If, in such a case, the matter erroneously inserted did not affect the original bill, as it had been engrossed and passed, or did not change the substance and vary the legal effect thereof, we would not be understood as deciding that the error would vitiate the whole act."

In *Prescott vs. Board of Trustees of Illinois & M. Canal*, 19 Ill., 325, the section introduced in the Assembly but which had not been acted on by the Senate, but was incor-

---

The State of Florida ex rel. v. Brown—Argument of Counsel.

---

porated into the act in enrolling it, gave a power of re-appraisal—a very material power.

In *Gaines vs. Harrigan*, 5 Lea, 608, 609, 613, the act regularly passed the Senate and in the House was amended in the second section by striking out “Thompson’s & Steger’s Code” and inserting “Revised Code of Tennessee,” but the amendment was never concurred in by the Senate; and it was held that in substance there was no amendment, “Thompson’s & Steger’s Code” and the “Revised Code of Tennessee” being the same book.

“If we may look to the journals to see that *in form* there was an amendment not concurred in, we may further look to see that *in substance* there was no amendment.”

“It seems to us that it would be the exercise of a power far more arbitrary and unwarranted for the court to declare the act of the supreme legislative authority void upon an objection like this in which there is no substance.”

In *Plummer vs. People*, 74 Ill., 361, it is held—“1st. Unless a change in the title to a bill in the two Houses concurring in its passage is one of substance, and calculated to mislead as to the subject of the bill, it may be regarded as a clerical mistake in no wise affecting the validity of the law. 2d. Where a bill passed the House entitled ‘a bill for an act to prevent the keeping of common gaming houses,’ but when introduced in the Senate it bore the title ‘a bill for an act to prevent the keeping of gaming houses and to prevent gaming,’ by which title it passed that body and was reported back, enrolled and approved, the body of the bill being identical in both Houses, it was held that the change did not render the act void.”

In *Moody vs. State*, 43 Ala., 115, the amendments omitted were material.

#### IV. Judicial Notice:

As the Constitution makes no positive provision, and

---



---

The State of Florida ex rel. v. Brown—Argument of Counsel.

---



---

furnishes no specific direction to ascertain what law is enacted by the other co-ordinate departments, or how or when they are so enacted, it follows that the court does so from and by reason of its inherent judicial knowledge and power. Hence an issue of fact, whether a particular bill has been passed in conformity with the constitutional provision will not be submitted to a jury. *Blessing vs. Galvesto*, 42 Texas, 641; *Moody vs. State*, 48 Ala., 115; *Evans v. State*, 30 Ind., 514; *Port vs. Supervisors*, 105 U. S., 66; *Walnut vs. Wade*, 103 U. S., 683.

#### V. Resorting to Journals:

The signatures of the Speakers and Governor are presumptive evidence of the power of the act. The journal may be examined. *Spangler vs. Jacoby*, 14 Ill., 297; *Furley v. County of Logan*, 17 Ill., 151; *People vs. Starnes*, 30 Ill., 121; *Gaines vs. Horrigan*, 4 Lea, 608; *Re Roberts*, 5 Co., 525.

The court will not act upon the admissions of parties that a statute has not been passed in the manner required by the Constitution. Such facts must be shown either by the printed journal or the certificate of the Secretary of State. *Happel vs. Brathauer*, 70 Ill., 166.

The certificate of the Secretary of State, showing what proceedings were had in either branch of the Legislature in relation to the passage of a bill, is competent to show whether or not the same was passed in a constitutional mode; and where such certificate, in due form, purports to give all the proceedings there can be no inference that at other proceedings were had in relation to the passage of the bill. *Ryan vs. Lynch*, 68 Ill., 160.

A statute having the proper forms of authentication cannot be impeached or questioned on mere parol evidence. *Berry vs. Balt. & D. Pt. R. R. Co.*, 41 Md., 446.

In this case original bills looked at as well as journals.



---

The State of Florida ex rel. v. Brown—Argument of Counsel.

---

**Void** section being distinct and separate, balance of statute held good.

**VI. Irregularities:**

The mere fact that in the transmission of a bill from the **Senate**, where an amendment thereto was made, to the **lower** house where it originated, a mistake was made by **changing** its original number "50" to "58" will not vitiate **the** bill, it appearing from the *Journal of the House* it **was** the same bill. Williams vs. State, 6 Lea, 549.

Where the Journals of the Senate showed that Senate **Bill** No. 453, for "An act to incorporate the Peoria, Atlanta and Danville Railroad Company," was introduced, read a **first** and second time and committed, and that the committee to whom was referred Senate Bill No. 453, for "An act to incorporate the Peoria, Atlanta and Decatur Railroad Company," reported back the same with amendments, and **that** the same was engrossed for a third reading, and finally **passed** upon the call of the yeas and noes: *Held*, That **these** facts did not impeach the validity of the passage of **the** bill. They did not sustain the objection that there **were** or might have been two different bills pending at the **same** time, and bearing the same number. The number is a better means of identifying the bill while pending in the **Legislature** than the title. Larrison vs. P. & C. R. R. Co., 74 Ill., 17; Plummer vs. People, 74 Ill., 361, *ante*; Walnut vs. Wade, 103 U. S., 683.

When an act of the Legislature is duly certified by the **Secretary** of State and published as a law of the State, the courts must receive it as having been passed in the manner required by the Constitution unless the contrary is clearly made to appear. Hensoldt vs. Petersburg, 63 Ill., 157.

The Constitutional provision requiring bills to be read on **three** several days before their passage does not apply to amendments to the same. People vs. Wallace, 70 Ill., 680.

---

The State of Florida ex rel. v. Brown—Argument of Counsel

---

The courts will not disregard an act of the Legislature because the Journals of one or both Houses of the Legislature fail to show its passage in strict conformity to directions in the Constitution, it being in other respects perfect and constitutional. *Blessing vs. Galveston*, 42 Tex. 641.

The failure of the presiding officer of the Senate to sign a bill, which was afterwards approved by the Governor and which the Journal of the Senate shows passed by the Senate by the Constitutional majority, does not affect the validity of the act. *Cottrell vs. State*, 9 Neb., 125; *People of Leavenworth vs. Higginbotham*, 17 Kansas, 62.

A bill originating in the Senate was passed by the House of Representatives with amendments, and returned to the Senate who concurred therein, but the vote on concurrence was not disclosed by the Journal: *Held*, That the act was valid. *McCulloch vs. State*, 11 Ind., 424; *Hull vs. Miller*, 4 Neb., 502; *Com'rs of Leavenworth vs. Higginbotham*, 17 Kansas, 62.

If the Journal of either House states that a bill was passed by a required Constitutional majority, and that a suspension of the rules by a required Constitutional majority was read more than once on the same day, the fact that the bill was so passed for such suspensions need not be given. What constitutes a "case of urgency" authorizing such suspension, is a matter of Legislative discretion. *Hull vs. Miller*, 4 Neb., 502; *McCulloch vs. State*, 11 Ind., 424.

The requirement of Section 26 of the Constitution of the State of Colorado, that the fact of the signing of a bill by the presiding officer in the presence of the House of Representatives which he presides shall be entered on the Journal of the House, and in the silence of the Journal it is to be presumed that the bill was so signed. *In re Roberts*, 5 Colo. 100.

Statutes are not to be lightly impeached. *Com'rs of Leavenworth vs. Higginbotham*, 17 Kansas, 74.

---

---

The State of Florida ex rel. v. Brown—Argument of Counsel.

---

---

When the Journals are silent touching a step in the proceedings which the Constitution requires to be taken, it will be presumed by the courts that the Constitutional requirement was complied with. *McCulloch vs. State*, 11 Ind., 424; *Walker vs. Griffith*, 60 Ala., 361; *Spangler vs. Jacoby*, 14 Ill., 297.

It is not necessary that the Journals of the Senate should state that a law was read three times before being put upon its final passage. This is presumed to have been done, unless the Journal show it was not done. *Supervisors vs. People*, 25 Ill., 181.

After this case had been submitted a brief of

*Mr. R. B. Archibald,*

who had been engaged in a similar case in the Circuit Court, was courteously loaned by Mr. A. to the Attorney-General, and filed for the consideration of the court.

*John Earle Hartridge, contra.*

The respondent takes the position that Chapter 3416, Laws of Florida, approved March 3, 1883, is a law notwithstanding the facts stated in relator's petition.

The facts set up by the petition and admitted by the respondent are in brief, as follows:

Assembly substitute for Bill 168 passed the House by a vote of 46 to 22, page 504, H. J., on 22d February, 1883, and was ordered certified to the Senate.

On 23d February said bill was transmitted to the Senate and committed to the Committee on Temperance. Senate Journal, pages 509 and 510.

On same day the committee reported the bill back to the Senate favorably, with amendments. Senate Journal, page 518.

---

The State of Florida ex rel. v. Brown—Argument of Counsel.

---

The amendments of the committee were adopted, and on motion of Mr. Sharpe, all after the word "minor" in section 4 was stricken out. The bill as amended was read the second time, first and second reading on 3d day, without waiving rules, and rules waived and put on third reading, waived again and put back, and on motion of Senator Duncan, all after word minors, in section 5, stricken out, rules again waived and put on third reading and final passage and passed, vote 11 to 8, ordered to be certified to the Assembly. Senate Journal, page 519.

This action of Senate was certified to House on same day, 23d February, and the House concurred in 1st Senate amendment and refused to concur in 2d and 3d amendments and asked for a committee of conference, appointing on their part their portion of the committee. House Journal, page 521.

The Senate were advised on the same day that the Assembly had concurred in Senate Amendment to the bill, to insert at the end of section two (2): "That the County Commissioners shall issue said license upon the presentation of such petition" and refused to concur in striking out all after the words minors in sections 4 and 5, and asked for a committee of conference. Senate appointed two Senators on such committee. Senate Journal, pages 524, 525.

Next day, 24th February, 1883, the conference committee reported, (to the Assembly, H. J., 536, to the Senate, S. J., 526,) recommending concurrence in Senate amendments to sections 3 and 5, and to add after "minors" in each section "or persons in a state of intoxication," which was read and adopted in both Houses the same day.

28th February, bill reported correctly enrolled, H. J., page 585.

Now the bill that passed the House on the 22d of February is not the bill as published, because on the 23d (next

---

The State of Florida ex rel. v. Brown—Argument of Counsel.

---

) the Senate provided for adding an important amendment to section 2, and to which I will again refer, and struck out about thirty lines from section 4, having reference to sale of liquors to habitual drunkards. Nor is it the bill that passed the Senate on the 23d day of February, as it reports to be, for that bill had nothing in section 4 after the word minors, nor in the 5th section after the same word.

The words, "or any person in a state of intoxication," have been added by the conference committee, and the second section of the bill should have contained at the same end of the second section the first Senate amendment, viz: "That the County Commissioners shall issue said license upon the presentation of such petition."

The court will observe that the conference committee of the 24th reported that the Senate amendments be concurred in.

This was the striking out all after the word minors in sections 4 and 5. The House, it will be marked, had previously concurred in the amendment to section 2, viz: "That the County Commissioners shall issue said license upon the presentation of such petition," and that the words "or any person in a state of intoxication" be added, was the action of the conference committee, and the bill with these latter amendments so added by the conference committee, (amendment to sections 4 and 5,) was enrolled and signed.

The amendment to the second section which made it obligatory upon the Commissioners to issue licenses, was wholly left out of the enrolled bill.

Therefore, no such bill, as published, ever passed either

laws similar to the one here presented have been declared void by the courts of other States, and have been declared to be the whole law invalid. Jones vs. Hutchinson, 43 Ark. 721; Moody vs. State, 17 Amer. R., pages 28,

---



---

The State of Florida ex rel. v. Brown—Argument of Counsel.

---



---

29; 48 Ala., 115; The State *ex rel.* vs. Platt, 2d S. C., page 150; 16 Amer. R., 6 and 7.

These are both cases exactly in point as to the omission or addition of amendments to a bill by the enrolling clerk.

The case of Jones vs. Hutchinson, was where the enrolling clerk erroneously enrolled an amendment that had been lost, and the bill so erroneously enrolled was signed by the Governor. The court decided that it was not a law.

The case of Moody vs. State was where an amendment had been left off the enrolled bill, and the court held that the law was not a valid one.

In the case at bar the amendment which was omitted was an important one. It made it mandatory upon Commissioners to issue the license. The mover of the amendment had an important end in view. He wished to prevent the Commissioners inquiring into the petitions of the signers thereof and to compel them, upon the mere presentation of a petition signed by a majority of the registered voters, to issue the license.

We claim that all acts subsequent to the time of the enrollment of this bill without the amendment to section two (2) which had been adopted were null and void.

This is the doctrine in regard to errors in the record, and when an amendment passes and is not enrolled, or does not pass and is enrolled, in those cases, at whatever distance of time the discovery is made, the subsequent proceedings with reference to such bills are null and void. Cushing on Law and Practice of Legislative Assemblies, marginal page 2402.

But the amendment adopted, and which was omitted from the enrolled bill, is material in another respect.

The law as it stood at the time of the passage of this bill authorized the Collector of Revenue to issue the license. This amendment would have changed the law in this respect.

---

---

The State of Florida ex rel. v. Brown—Opinion of Court.

---

---

spect and made it compulsory upon the County Commissioners to have issued the license.

Certainly some limit must be set to reckless legislation. If they can omit an amendment of this kind without impairing the validity of the law, what is to prevent them going further at a different time.

For this court to uphold the validity of this law would be to establish a precedent dangerous in the extreme. Legislative bodies are purposely hedged in by rules and restrictions, and particular formalities are observed that the very errors that we complain of may be avoided. If to permit recklessness in legislative matters there is added the sanction of the highest court in the State, it may be impossible to conjecture to what the people may not be subjected to under the forms of legislation.

The Senate Journal, page 519, shows that rules were not waived. This is violation of the Constitution. Article 4 Sec. 15 of Constitution.

THE CHIEF-JUSTICE delivered the opinion of the court.

This is an original application for a mandamus to compel the Collector of Revenue to issue a license to relator to sell intoxicating liquors, notwithstanding the act of the Legislature of 1883, Chapter 3416. It is alleged by relator that the act printed in the statutes is not a valid law because a material amendment to the bill had been made by the House of the Legislature before its passage, which amendment had not been incorporated in the bill as enrolled and signed, and therefore the act as published is not the act as passed. It is also alleged that the act was not passed in a constitutional manner, it having been read a second time on one day without waiving the constitutional rule on that subject. The Journals of the Senate and As-

---

---

The State of Florida ex rel. v. Brown—Opinion of Court

---

---

sembly are referred to as showing the irregular and unconstitutional manner of the passage of the bill.

Respondent moves to quash the alternative writ. This motion, it was conceded, brought up the whole upon its merits, the Journals of the Legislature being considered in connection with the allegations of relator.

It is contended by relator that when the bill was in the Senate (known as Assembly Bill No. 168) there amended by inserting at the end of section two words: "That the County Commissioners shall issue license upon the presentation of such petition," and then passed the Senate with this amendment, and on the day the amendment was concurred in by the Assembly that this addition to section two was omitted from the enrolled bill and was not incorporated in the act as approved by the Governor.

If the journals show conclusively that any material portion of a bill as passed was omitted in the enrolling, so it may be considered that the act as approved was not passed by the Legislature and does not express the legislative will, the act as approved, at least to the extent it is affected by the omission, must be held invalid. This is a rule now well settled by the American courts.

The Constitution requires the keeping of journals of their proceedings by the respective Houses of the Legislature; and these Journals are received as evidence of their proceedings. When an act is duly approved and published it is *prima facie* a law; but if the Legislative Journals show that instead of being passed it was defeated, or that it was the same that was passed, it is not a law. See the collection of cases in Cooley's Con. Lim., 5th Ed., 163, note.

Upon an examination of the Journals of the Senate and Assembly of 1883 we are unable to find that the amendment above mentioned was voted upon or adopted.



---

---

The State of Florida ex rel. v. Brown—Opinion of Court.

---

---

mention was made in either Journal that any such amendment was moved by any member or considered by either House.

The only mention of it contained in the Journals is in a communication of the Clerk of the Assembly addressed to the President of the Senate under date of February 23d, 1883, as follows:

“SIR: I am directed by the Assembly to inform the Senate that the Assembly has concurred in Senate amendment to Assembly Bill No. 168. Insert at the end of section two, ‘that the County Commissioners shall issue said license upon the presentation of such petition,’ and refused to concur in the second Senate amendment ‘to strike out all after the word minor in the fourth section,’ and refused to concur in the third Senate amendment, ‘to strike out all after the word minor in the fifth section,’ and ask for a committee of conference, and have appointed Messrs. Harris, Cobb and Kickliter such committee on the part of the Assembly, and respectfully request the appointment of a similar committee on the part of the Senate.” (Signed by the Clerk.)

Now, the *Senate Journal* does not show that such an amendment was moved or voted upon in the Senate, nor do the words appear in any report of any committee which was acted on by the Senate. The only indication that such an amendment had been made is in this letter of the Clerk of the *Assembly* to the President of the Senate. The Clerk of the Assembly is not the proper source of information as to the action of the Senate, and nowhere else do we find the statement.

In the Journal of the Assembly, as before stated, we do not find any mention of any motion or vote upon this amendment.

The report of the Enrolling Committee of the House

---

---

The State of Florida ex rel. v. Brown—Opinion of Court.

---

---

shows that the committee had examined the bill as enrolled, and find it "correctly enrolled." On the same day the Speaker of the Assembly and the Clerk signed the bill attesting that it was the bill as passed. The bill was also duly signed by the President and Secretary of the Senate thus attesting its correctness.

We have, then, no evidence that the words of the supposed amendment were ever adopted by the Senate or Assembly and passed as part of the bill, but we have the negative evidence of the Journals of each House that no such amendment was passed, the Journals not showing it, and the affirmative evidence of the presiding officers and clerks that the bill was passed as signed by them; and the certificate of the Enrolling Committee of the Assembly that it was enrolled as it was passed.

We cannot regard the communication of the Clerk of the Assembly to the President of the Senate as evidence of the proceedings of the Senate while the Senate Journal does not contain such proceedings, nor does the Assembly Journal show its action on the amendment; nor can we regard that communication as controlling evidence, that the Enrolling Committee and the Speaker and the same Clerk of the Assembly were mistaken in certifying to the correctness of the enrolled bill.

The bill, after the supposed amendment, was in the hands of a committee of conference of both Houses, which committee reported the bill to the respective Houses and their report was adopted. There is nothing to show that any further action was had upon the bill before it went to the Enrolling Committee and they reported it correctly enrolled.

The conclusion is that there is no evidence in the Journals of the two Houses that the act as approved is not identical with the bill as passed by the Legislature.

---

---

The State of Florida ex rel. v. Brown—Opinion of Court.

---

---

The only remaining question suggested by the relator is **that** the act was not passed in conformity to the rules **pre-**  
**scribed** in the Constitution, in this, that the bill was read  
**a** second time on the same day without waiving the rule  
**prescribed** in Section 15, Art. IV., to wit: "Every bill  
**shall** be read by sections on three several days in each  
**House**, unless, in case of emergency, two-thirds of the  
**House** where such bill may be pending shall deem it **expe-**  
**dient** to dispense with this rule, but the reading of a bill  
**by** sections on its final passage shall in no case be dispensed  
**with**; and the vote of the final passage of every bill shall  
**be** taken by yeas and nays, to be entered on the Journal."

The bill having been passed by the House of Assembly  
went to the Senate February 23d, and on the same day a  
committee reported the bill for the action of the Senate  
"with amendments." After amendments had been acted  
on the bill as amended was read a second time. "Mr.  
Bryson moved to waive the rule and that the bill be read  
the third time and put upon its passage, which was agreed  
by a two-thirds vote. Mr. Duncan moved that the rule  
be waived and that the bill be put back on its second read-  
ing for purposes of amendment, which was agreed to by  
unanimous consent. Mr. Duncan offered the following  
amendment: Strike out all after 'minor' in section 5,  
which was adopted. On motion, the rule was waived by  
unanimous consent and the bill as amended was read the  
third time and put upon its passage." The vote was, yeas,  
11; nays, 8; so the bill passed. The above is quoted from  
the Journal.

The rule having been waived, it was only necessary to  
read the bill entire on its final passage, and this was done,  
after which the yeas and nays were called and recorded and  
the bill was passed. The rule being dispensed with, which  
the Senate was authorized to do, when, in its judgment, it

---



---

The State of Florida ex rel. v. Brown—Opinion of Court.

---



---

was expedient, there was no necessity of reading the bill on three several days or three several times. The rule requiring it was not in existence as to this bill.

Says Judge Cooley, in his Constitutional Limitations, [136] 164: "Whenever it is acting in the apparent performance of legal functions, every reasonable presumption is to be made in favor of the action of a legislative body; it will not be presumed in any case, from the mere silence of the journals, that either House has exceeded its authority or disregarded a Constitutional requirement in the passage of legislative acts, unless where the Constitution has expressly required the journals to show the action taken, as for instance, where it requires the yeas and nays to be entered." This is sustained by numerous adjudications cited by the author. The principle announced covers this entire case. There must be affirmative evidence that an act attested by the officers of both Houses and approved by the Governor was not passed in accordance with the essential requirements of the Constitution, or it must be upheld.

The writ is quashed.

MR. JUSTICE WESTCOTT delivered the following opinion

The act regulating the sale clearly contemplates that the Collector of Revenue shall issue the license to sell. The general revenue statute makes express provision to that effect. The act regulating the sale, when construed with reference to the other legislation upon the subject, contemplates that the County Commissioners shall issue a permit which is to be the basis of the act of the Collector in issuing the license. Any amendment, therefore, providing in terms that the County Commissioners should issue a license to be given an effect consistent with the clear intent of the entire Legislation, must be construed to be equivalent

---

---

State ex rel. v. Co. Com'rs Jefferson Co.—Syllabus.

---

---

to authority to issue a permit, and nothing more. As this authority is already granted, the omission of the amendment would be an immaterial matter, the law having the same effect with it as without it. I have not examined to see whether such an amendment was made. With the conclusion I state, the other Justices concur.

---

**THE STATE OF FLORIDA, EX REL. HERMAN BASH, VS. THE  
COUNTY COMMISSIONERS OF JEFFERSON COUNTY, RESPOND-  
ENTS.**

1. The act of March 3, 1883, to regulate the sale of intoxicating liquors, wines and beer, provides that an applicant for a license shall present a petition asking the Board of County Commissioners to grant the right "to sell such liquors, wines or beer." A petition asking for a license "to sell spirituous or intoxicating liquors, wines and beer," is a good and sufficient form of application under the act.
2. That law imposes upon the County Commissioners the duty to act upon a petition for a license to sell intoxicating liquors, and if such application is properly signed, authenticated and published, they should grant it. They have no discretion or authority to prohibit the sale of liquors by refusing to act upon a proper petition.
3. If the law had failed to require the Board of Commissioners to act upon such applications, it would have been totally inoperative to accomplish its expressed object. "Courts, in construing a statute, should, so far as the language will admit, give such a construction as will make it practicable, just and reasonably convenient."
4. A petition for a license signed by less than the majority of voters of the district was denied. At the ensuing regular meeting and additional number of names, thus making a majority, was affixed to the original petition on file and the whole duly authenticated and published: *Held*, That though courts would consider such

---



---

State ex rel. v. Co. Com'rs Jefferson Co.—Statement of Case.

---



---

signing of a paper already on file in judicial proceedings irregular, yet in transacting the ordinary business of the community by plain people in a simple manner the strict rules of courts should not be enforced, no fraud being imputed. And if a petitioner shows that a majority have expressed themselves it is of no consequence whether the additional names are signed on the original or to an additional petition of the same import.

5. When a petition for license to sell liquors, signed by the required majority of voters, duly authenticated and published, is presented to the Commissioners under the act, the applicant is entitled by law to the affirmative action of the Board; and the Board cannot be influenced by petitions or other interference by remonstrances or by requests to erase names of signers. After the petitioner has instituted his proceedings, his acquired private right cannot be taken away by other persons attempting to discontinue them.
6. An appeal to the court on moral grounds to withhold a writ of *habeas corpus* requiring the issuing of a license to sell intoxicating liquors, and thus to annul a valid act of the Legislature by refusing to enforce it, is addressed to the wrong tribunal. The moral standard of individual judges is not the proper boundary of legislative discretion.

The County Commissioners are Chas. T. Carroll, Geo. Taylor, Daniel H. Bryan, James B. Roach and T. J. Moore. Upon the motion to quash the writ being overruled, one of the Commissioners, Mr. T. J. Moore, filed a return stating that the relator presented his petition to the Board of Commissioners on March 5, 1884, duly signed by a majority of the registered voters of the district, sworn to and published as required by law, and that he, Moore, voted at the meeting of the Board on that day against the resolution denying the permit, and his vote was recorded; and that on the 12th day of March, at a meeting held after the service of the alternative writ, he moved a reversal of the former action of the Board refusing the permit, but his motion was overruled. He disclaims any denial or refusal of a permit as asked, and says he is and has always been willing to grant the permit. The relator moved to strike out the r

---

State ex rel. v. Co. Com'rs Jefferson Co.—Argument of Counsel.

---

urn of the other Commissioners because it “is evasive, argumentative, uncertain, insufficient,” and for final judgment.

The other facts of the case are stated in the opinion.

*T. L. Clarke* and *Wm. B. Lamar* for Relator.

*R. B. Hilton* for Respondents.

Sedgwick Stat. and Con. Law, 239, 240, *et seq.* Best vs. Gholson, 89 Ill., 465; Fry vs. Chicago R. R. Co., 73 Ill., 399; Benton vs. Wickwire, 54 N. Y., 226; Rosenplaenter vs. Roesslle, 54 N. Y., 262; St. Louis R. R. Co. vs. Clark, 53 Mo., 214; Woodberry vs. Berry, 18 Ohio St., 456.

The writ of mandamus is not a writ of right. It is granted not of course, but only at the discretion of the court to whom the application is made and this discretion will not be exercised in favor of applicants unless some just and useful purpose may be answered by the writ. State Ex., &c. vs. Graves, 19 Md., 351.

The court will not grant a mandamus except when it is clear there is a legal obligation to perform the duty commanded. State vs. Jacobus, 2 Dutcher, 137.

[This was a case in which the Legislature had by an omission failed to declare specifically the duty which was sought to have discharged.]

When a mandamus was sought to compel council to approve a liquor dealer's bond, the petition for order to show cause should show respondents reason for refusal, otherwise the reason must be presumed to be sufficient and the order may be refused. Goss vs. Common Council, 41 Mich., 314.

Parties signing petition for an election for re-location of county site, may withdraw their names at any time before it was submitted to the Board, or afterwards before it was

---

---

State ex rel. v. Co. Com'rs Jefferson Co.—Opinion of Court.

---

---

acted on. *Nebraska vs. Board County Commissioners*, 10 Neb., 33.

Finally: On the strength of the authorities, I repeat mandamus is not a writ of right. It issues at the discretion of the court when some valuable public or private purpose is to be promoted. Do the interests of the public demand the opening of a grog shop in the town of Monticello? Do the interests of the relator require that he should be aided to enter upon an occupation, which according to all history brings ruin to those engaged in it? Did I dare, I should say your honors have now, here, the opportunity, in violation of no legal principle, but in strict accordance with the highest, to make a decision which shall be as memorable as that by which Lord Camden declared the invalidity of general warrants, and that of Lord Mansfield, in the *Somerset* case, declaring that no slave could breathe the air of England and continue to be a slave. Those decisions were made in behalf of the great cause of human liberty. Yours will be no less important in promoting morality, good order and all the interests of State and family.

THE CHIEF-JUSTICE delivered the opinion of the court.

I. The relator presented his petition to the Commissioners for a "license to sell spirituous or intoxicating liquors, wines and beer," in the sixth election district in Jefferson county, which petition he avers contained the names of a majority of the registered voters of the district, with due proof of the signing and publication as required by law. The Commissioners refused to grant him a permit or license, and he obtained an alternative writ of mandamus from this court. Respondents move to quash the writ, because:

*First.* The application is not in compliance with the



---

---

State ex rel. v. Co. Com'rs Jefferson Co.—Opinion of Court.

---

---

terms of the law, which says the application shall be to sell "liquors, wines, or beer," whereas the petition is for a license to sell "spirituous or intoxicating liquors, wines and beer."

*Second.* Because the application was for a license to sell spirituous or intoxicating liquors, wines *and* beer, whereas the authority of the Commissioners, if any they have, is to grant licenses to sell such "liquors, wines *or* beer."

*Third.* That there is nothing in the law requiring and commanding the Commissioners to grant a license or permit to sell intoxicating liquors, wines or beer, or to license the sale of anything whatever.

The language of the act of March 3, 1883, ch. 4416, is that it shall not be lawful for any person to sell any intoxicating liquors, wines or beer in any election district, in any county, except as hereinafter provided. 2. Any person wishing to sell liquors, wines or beer shall make application to the Board of County Commissioners for a license to sell such liquors, wines or beer, said application to be signed by a majority of the registered voters in such election district, the petition to be published, &c. 3. No Collector of Revenue shall issue license to any person "unless a permit is presented from the Board of County Commissioners." These are the essential points of the law applicable to this case.

As to the first ground of the motion, it is only necessary to say that the application for a license to sell *spirituous or intoxicating* liquors is in strict accord with the law in its letter and spirit, the sale of *intoxicating* liquors without license being the only thing prohibited by the first section, the second section directing how such license must be applied for. "Spirituous" and "intoxicating" liquors are understood to mean the same thing in a license law. *State vs. Townley*, 18 N. J., 321.

---

State ex rel. v. Co. Com'rs Jefferson Co.—Opinion of Court.

---

The second ground, that the petition was for license ~~to~~ sell liquors, wines *and* beer, while the words of the law ~~are~~ "liquors, wines *or* beer," is equally untenable. A license to sell liquors, wines *or* beer is a license to sell liquors, wines *and* beer, according to the very terms of this law. The prohibition in the first section is against the sale of intoxicating liquors, and any liquor, whether it be whiskey, wine, beer or any other kind that produces intoxication, is included in the term intoxicating liquors. *People vs. Crilly*, 20 Barb., 246.

The third ground is that the law does not require the County Commissioners to grant a license under any circumstances; that no duty is imposed upon them, and they can be required neither to grant or refuse a permit or license, because there is no such duty.

Previous to the passage of this act, every man who demanded a license to sell liquors and paid the required amount, was entitled to it. The purpose of this law was to prohibit this indiscriminate issuing of licenses to everybody by the Tax Collector, and confine the right to sell intoxicating liquors to such persons as could obtain the endorsement of their neighbors to be proper persons to be entrusted with it, and also to make it a source of public revenue. The right to sell such liquors was a lawful right under the license, and it is a lawful right still, expressly authorized by the Legislature, but under greater restrictions as to the manner of obtaining license and the persons to whom the sale may be made. The law is restrictive, not prohibitory. It says, first, the sale shall not be engaged in by any person except under the conditions specified. These conditions are the presentation of a petition to the County Commissioners, signed by a majority of the registered voters of the district, which petition and signatures must be published "two weeks before the County Com-

---

---

on Co.—Opinion of Court.

---

---

petition.” The succeeding  
 “issuing a license “unless a  
 the Board of County Commis-

the act is not prohibitory of licen-  
 for a license, but such sale is recog-  
 nized, as much so as before this act.  
 decline “to hear such petition” *they*  
 and the sale. The theory of the whole  
 of such prohibition. The title of the  
 regulate the sale of liquors, wines and  
 of County Commissioners,” not to *pro-*  
 and the body of the act prescribes how the  
 all be made to the Board “for a license to  
 and the Board to grant to said applicant the  
 the Collector shall not issue a license unless a  
 the Board is given.

tion now is whether under this act the law con-  
 and requires any action on the part of the Board.  
 here takes the negative, on the ground that the  
 not in direct terms command action. It is not a  
 tion of verbal interpretation. There is no ob-  
 to the meaning of the words.

ing to Vattel’s rules of construction of treaties:  
 nterpretation that leads to an absurdity ought to  
 ed.” Sedgwick on Stat. & Const. Law, 270.  
 erpretation which would render a treaty null and  
 it cannot be admitted.” *Id.* “The rules of con-  
 which apply to general legislation, in regard to  
 ject in which the public at large is interested, are  
 ent from those which apply to private  
 duals, of powers or privileges designed to  
 a special reference to their own advantage.  
 to be expounded largely and beneficially for

---

State ex rel. v. Co. Com'rs Jefferson Co.—Opinion of Court.

---

the purposes for which they were enacted. *Id.*, 34 ~~1~~; Bradley vs. R. R. Co., 21 Conn. R., 306; Dwarris, 200.

“Where the object of the Legislature is plain, and ~~the~~ words of the act unequivocal, courts ought to adopt such ~~a~~ construction as will best effectuate the intention of the ~~L~~egislature; but they must not, even in order to give effect to what they may *suppose* to be the intention of the ~~Legi~~slature, put upon the provision of a statute a construction ~~not~~ supported by the *words*, even though the consequences should be to defeat the object of the act.” Frye vs. C. & Q. R. R. Co., 78 Ill., 402; Dwarris, 202.

A legislative act is to be interpreted according to the ~~in~~ intention of the Legislature, apparent on its face. ~~Every~~ technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the Legislature. 2 Pet., 662; 4 Dall., 14; 2 Cranch, 33; *id.*, 386; 3 How., 565.

Courts in construing a statute should, so far as the ~~lan~~guage will admit, give such a construction thereto as ~~will~~ make it practicable, just and reasonably convenient. Roenplaenter vs. Roesslle, 54 N. Y., 262; Benton vs. Wickwire, *id.*, 226.

Governed by these established rules we inquire what ~~was~~ the evident intention of the Legislature in enacting ~~this~~ law. It is very plain to our minds that the act providing in express terms, and in accordance with the purpose expressed in its title, that it will be unlawful to sell intoxicating liquors without a license; that in order to obtain it there must be a permit granted by the County Commissioners; that an application therefor must first be presented to them “asking” them “to grant to said applicant ~~the~~ right,” signed by a majority of the voters of the district in which he desires to carry on the business, and duly attested and published for two weeks; it is the clear duty of

---

---

State ex rel. v. Co. Com'rs Jefferson Co.—Opinion of Court.

---

---

the Board to ascertain whether the terms and conditions on which the applicant is entitled to the "right" have been complied with; and if they have been complied with there is no discretion given to the Board to refuse "to grant" the permit.

No judicial discretion or judgment is vested in this ministerial Board, beyond the ascertainment of facts as to the identity of the names on the registration list of the district with those sworn to be signed to the petition and witnessed, the fact of publication, and whether the number of the signers is a majority of those registered. These facts are simply facts to be ascertained by the use of the simple faculties of reading and computation—plain words and figures.

These conclusions are not reached by any strained construction of the act, or by extending its meaning beyond its expressed terms. If we were to conclude that this law did not impose any duty upon the Board of County Commissioners, and that it afforded no means by which the party complying with all the conditions necessary to obtain the "right" which the law says he may have on such conditions, the further conclusion would inevitably be that the whole law is inoperative to effect the expressed purposes of the Legislature. The only way to uphold the law is to construe it, as we think we have done, according to the plain meaning of its terms, and the clearly expressed intention of the Legislature. It is the duty of courts to carry out such intention and sustain a law, rather than condemn it, if its enforcement is practicable without adding to or subtracting from its provisions.

II. The respondents admit that the relator's petition contains the names of a majority of the registered voters of the district, and that the signatures are properly verified, and the necessary publication was made. But they say that the

---

State ex rel. v. Co. Com'rs Jefferson Co.—Opinion of Court.

---

petition was presented to them at a meeting on the si~~th~~ day of February, and that there were less than a major~~ity~~ of the names of registered voters of the district then sig~~ned~~ to it, whereupon they refused to grant the license. T~~hat~~ on the fifth day of March, at their regular meeting, rel~~ator~~ presented the same petition with 27 names added to it. That the petition as first presented was in the proper ~~custody~~ custody of the Board, and could not be withdrawn for the purpose of adding names or amendment, without the proper and formal leave of the Board, which permis~~sion~~sion had not been granted, and because, for these reasons the petition was invalid, they denied the prayer of the petition. No fraud is imputed. The petition with the 27 add~~ed~~ed names had been duly published. While it would not be proper to withdraw a paper from the files of a court, or to add anything to it without leave of the court, yet we a~~re~~ not prepared to say that the strict rules of judicial proced~~ure~~ings should be applied to the conduct of citizens an~~d~~ County Commissioners in transacting the ordinary busines~~s~~ of plain people, not trained to that precision of conduct which is required by the courts. It might not be politic to enforce such strict rules of practice in such affairs, as a court might require to be observed. Suppose the citizens desiring to sign the petition after the February meeting did place their names upon it while it was in the Clerk's office, or belonged there; or suppose they had signed their names to the number of 27 to the petition written on another piece of paper, and these added to the names already signed to the petition in the first instance made the majority required by law; can it be said in either case that the majority have not petitioned for the license? The objection does not go to the fact that these 27 additional voters had no right to sign a petition, but only to the fact that they signed the paper filed in the Clerk's office instead of a new

---

---

State ex rel. v. Co. Com'rs Jefferson Co.—Opinion of Court.

---

---

**p**aper of like purport. The fact remains that the requisite **m**ajority have expressed their wishes in the form required **b**y the law.

The respondents further say that at the date of the meeting in February and in March there was in the hands of the **P**resident of the Board the petition of twenty-two of the **p**ersons who had signed the relator's petition for a license, **r**equesting that their names might be stricken from the **p**etition, and that the said Board would "not regard their **n**ames as favoring said petition of H. Basch;" and that if **t**hese twenty-two names were stricken off there would **r**emain less than a majority petitioning for the license. That **t**his paper having the twenty-two names attached was not **a**cted upon by the Board, only because in their judgment **t**here were other sufficient grounds for refusing the **a**pplication for a license.

The license was not refused then for want of the requisite **m**ajority of signers to relator's petition, because the request of the twenty-two was not before the Board, but "in the hands of the President," and the Board did not act upon it.

When the relator presented his petition signed by the required majority, duly proved and published as provided by law, he was entitled under the law to demand that the **B**oard take such action that he might procure a license from the Tax Collector, and if his *right* to the license existed when he presented his application that right could not be affected by any *subsequent* erasing or withdrawing of names from the petition. The law does not contemplate that after the petition is presented to the Board they shall be influenced in any manner, by petitions or other interference from other persons, by way of remonstrance against granting the license.

A case is cited where petitioners for the change of loca-

---

State ex rel. v. Co. Com'rs Jefferson Co.—Opinion of Court.

---

tion of a county seat in Nebraska went before the Board of Commissioners and had their names erased from a petition asking that an election be called for that purpose, and the names having been erased the number remaining was not enough to authorize the calling of the election. The court declined to issue a writ of mandamus, and say that in an application for the re-location of a county seat the petitioners may be regarded as *plaintiffs* in the proceeding, and any or all the signers of such a petition may withdraw their names at any time before it is presented to the Board, and if they have been improperly influenced to sign they may withdraw their names before an order for an election is made; because the Commissioners should not call an election unless at the time of calling it more than three-fifths of the voters are in favor of it. Being regarded as *plaintiffs* in the proceeding the petitioners could, at any time before action taken, withdraw their suit. *The State vs. Nemaha Co.*, 10 Neb., 32.

That case is unlike the present, because though a signer of the petition may, before action taken, demand that his name be erased, yet after the person applying has published and filed his petition for a license to be issued to himself, he has instituted a proceeding before a lawful tribunal, and acquired a private right, and the proceeding having been thus instituted other persons have no right to intervene to his injury. It would be very like allowing a witness to withdraw a suit.

In this case, however, the paper signed by the persons who wish to withdraw their signatures was not presented to the Board before the petition was filed by relator, and his proceeding thus inaugurated; nor does it appear that it was presented to the Board at any time. It can have no influence here.

An appeal is made to the court by counsel for respond—



---

 City of Pensacola vs. Reese—Syllabus.
 

---

ents upon the grounds of public and private morality to withhold this writ. This is not a proper argument to be addressed to a judicial tribunal against the enforcement of a valid law of the State. These grounds were doubtless addressed to the Legislature to induce it to pass the act. If courts yield to it, they usurp legislative functions and make the moral sentiments of each individual judge the measure and boundary of legislative discretion.

The motion to quash the alternative writ is denied. The motion for final judgment is allowed, and a peremptory writ awarded.

---

**THE CITY OF PENSACOLA, PLAINTIFF IN ERROR, VS. GEORGE REESE, DEFENDANT IN ERROR.**

**Writ** of error must be sued out in the name of a party to the record. If a person not a party to the record has such an interest as gives him the right to sue out a writ of error he must sue it out in the name of a party to the record. The parties of record here are to be as they are in the Circuit Court: *Quere*. Whether under our statute (Chapter 3129, Laws,) a municipal corporation can sue out a writ of error in the name of its officer to try the legality of the discharge of a prisoner from his custody, as marshal of the city, who was in his custody for an alleged violation of its ordinances.

**Writ** of Error to the Circuit Court for Escambia county.

The defendant in error moved to dismiss the writ because it "was not sued out by a party to the judgment below."

*S. R. Mallory* for the motion.

*S. Belden contra.*

---

 Gagnet vs. Reese—Syllabus.
 

---

MR. JUSTICE WESTCOTT delivered the opinion of the court.

A trial was had before the Mayor of the City of Pensacola of George Reese for an alleged violation of the ordinances of the city. After conviction and while in the custody of the Marshal the prisoner sued out a writ of *habeas corpus* before the Judge of the Circuit Court, who discharged him. The City of Pensacola now brings this writ of error in its own name, and not in the name of its officer, the person to whom the writ was issued and the party to the judgment. Even if the writ may be issued at the instance of the city as a party aggrieved by the judgment, although it is not strictly "a party to such judgment," as provided by the statute, still we are entirely satisfied that such writ must issue, not in the name of the city, but in the name of the officer, the party to the judgment. The case must be brought here as it was in the Circuit Court. This writ must therefore be dismissed. In the present state of the record, the question whether the city may sue out the writ in the name of its officer, does not arise, and of it we say nothing.

The writ is dismissed.

---

RICHARD GAGNET, MARSHAL OF THE CITY OF PENSACOLA,  
 PLAINTIFF IN ERROR, VS. GEORGE REESE, DEFENDANT  
 IN ERROR.

The statute of this State regulating proceedings upon writs of *habeas corpus* does not authorize the State, or any political subdivision of the State, or any officer of either of them, to prosecute

---

---

Gagnet v. Reese—Opinion of Court.

---

---

writ of error to a judgment discharging a prisoner from confinement. The various sections of said statute (Chapter 3129, Laws) considered with reference to this subject.

Writ of error to the Circuit Court for Escambia county.

After the dismissal of the writ of error in the preceding case this writ was brought in the same case by Gagnet, the Marshal of Pensacola.

*S. Belden* for Plaintiff in Error.

*S. R. Mallory* for Defendant in Error.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

Under the English practice it was only to judgments in causes where issues might be joined and tried, or where judgments might be had upon demurrer, that a writ of error would lie. To *habeas corpus* proceedings, therefore, where no such issues could be taken, or judgments upon demurrer had, no writ of error would lie. Under the American practice, even where the strict rules as to the acceptance of the truth of the return prevailing in England did not obtain, writs of error did not lie to such proceedings because they were held not to be final judgments. Neither of these reasons are now applicable to proceedings in *habeas corpus* under our statute. Evidence in contradiction of the return may be now received and the judgments rendered are final in their character in most cases. The *habeas corpus* proceeding cannot be again invoked. The reasons why the writ did not lie, therefore, have here ceased to exist. But we are not left to doubt upon the subject. The statute itself provides that the judgment, if it be one remanding the petitioner to the custody and control from which he came, can be changed or affected in no other direct way

## Gagnet v. Reese—Opinion of Court.

than by a writ of error, and if he seeks redress in another suit against those from whose control or custody he has sought to be redressed he is confined to his action for false imprisonment. The same section provides further that where the petitioner is discharged from confinement he cannot be afterwards confined or imprisoned for the same cause unless by the order or judgment of a court of competent jurisdiction. This is the 11th section. A further and subsequent section provides that if "any party to such judgment shall feel himself aggrieved thereby," he may have a writ of error.

The question here is, has the prosecutor, whether it be the State or any political sub-division thereof, the right to a writ of error in case the prisoner is discharged.

The clear effect of the 11th section is to enact that a judgment remanding a prisoner may be the subject of a writ of error, and may be thus directly reversed and set aside, but that a judgment discharging a person confined in such manner as was the prisoner here can never be directly affected in any proceeding by writ of error in the same case or prosecution. He may be afterwards confined by the order or judgment of a court of competent jurisdiction "for the same cause," but this confinement must be such an one as is consistent with the nature of the other judgment. Such as would perhaps be the case of the subsequent confinement or imprisonment of the party for the same cause, but upon new and additional evidence or after other and legal proceedings of a tribunal authorized to present an indictment, such as a grand jury.

Should this court reverse this judgment upon a writ of error, and such must be its course if a writ of error lies and we think there is error, we must set aside the judgment of discharge in the same case, which we think the statute does not contemplate. The Legislature never here

---

---

Gagnet v. Reese—Opinion of Court.

---

---

intended to modify the common law effect of a judgment of discharge of a prisoner except as the terms of the statute clearly indicate, and to construe the words order or judgment of a court of competent jurisdiction in the 11th Section of this act to embrace an order of this court, reversing that judgment, would be inconsistent with all of the preceding portion of the act. It would be little less than stupid for the Legislature to say in an act affecting the liberty of the citizen that in a given case the Judge before whom the imprisoned citizen was to be brought should "forthwith grant the writ returnable immediately, that the writ shall be executed without delay and the body of the prisoner be brought before the court without delay, and that the court should without delay, either discharge him, admit him to bail, or remand him to custody," and at the same time provide that after all of these things were done, or ordered to be done, the judgment in case of discharge would be the subject of review upon error. Again, we find but two States in which anything of the kind was ever practiced, and in each of these any effect upon the reversal of the judgment so as to authorize the subsequent arrest of the prisoner is disclaimed and discountenanced. One of these courts says: "No decision that can be made by this court will recapture the defendants and bring them to justice. But it has been urged upon us by the Attorney-General to express an opinion which may prevent their former discharge from being urged in their behalf in case they should be retaken and may serve to guide magistrates in like causes." Dudley (Law) Rep., S. C., 295.

In the State of Ohio, an early statute provided that the proceedings on any writ of *habeas corpus* should be recorded by the clerks and may be reviewed on writs of error and *certiorari* as in other cases now provided by law, and at the

## Gagnet v. Reese—Opinion of Court.

time of this enactment these writs were the remedies ~~for~~ of correcting proceedings at law in civil or criminal cases. Subsequently an act passed declaring that writs of error or *certiorari* to reverse, vacate or modify judgments or orders in civil cases, are abolished, and a petition in error was substituted. In a subordinate State court one Collins, held under process of a court of the United States, was discharged from custody. The Supreme Court of Ohio upon *certiorari* to this judgment dismissed the suit upon the ground that a petition in error, not a *certiorari*, was the remedy. The court says: "We regard this in the nature of a civil proceeding, but if it be in the nature of a criminal proceeding against a prisoner charged with crime it is subject to the fatal objection that no such remedy can be maintained in favor of the prosecution against the defendant. The right to prosecute a writ of error or *certiorari* against one who is indicted and tried for a crime or offence is not given to the State, nor to those who prosecute offenders under its laws." Were we to reverse this judgment, what would our order be? Would we set aside the judgment of the Circuit Court and direct the Judge thereof to send his officers to hunt up a discharged prisoner, and if they caught him to deliver him to the City Marshal, or would we simply reverse the judgment and let the Marshal arrest him? These would be strange judgments unknown to the courts of any State in the Union, anomalies in the law which we cannot and should not introduce.

We think that section 12 must be so construed as to limit the writs of error therein authorized to cases of *habeas corpus* other than those in which a prisoner held for conviction of alleged crime has been discharged by the Circuit Court; that this is the only construction which can be given this section of the act consistent with the other sections and the manifest purpose of the Legislature to afford

---

---

Ross, Keen & Co. v. Steen—Statement of Case.

---

---

a speedy, effectual and immediately operative proceeding where a citizen's liberty is in question, to determine whether "he is detained in custody with or without lawful authority."

As to the costs: Under the statute the costs may be awarded in favor of the prisoner, and if this be so, the other party to the record is the only one against whom they can be taxed.

Writ of error dismissed.

---

ROSS, KEEN & Co., PLAINTIFFS IN ERROR, vs. JOSEPH L. STEEN, DEFENDANT IN ERROR.

An affidavit to obtain an attachment against a debtor's property that affiant is "informed and believes that the defendant is indebted," is not sufficient. The indebtedness should be directly stated, or the affiant should state such facts as would show the indebtedness.

Writ of Error to the Circuit Court for Escambia county.

Plaintiffs obtained from the Clerk of the Circuit Court a writ of attachment upon the following affidavit and bond:

IN ESCAMBIA COUNTY CIRCUIT COURT, STATE OF FLORIDA.

Wm. P. Ross, Alfred Keen, Josiah Morrow, Chas. K. Lincoln and John Ross, Partners as Ross, Keen & Co., vs. Joseph L. Steen.—Damages \$900.

"Before the subscriber personally appeared Wm. A. Blount, attorney for plaintiff, who being duly sworn, says that he is informed and believes that the defendant in the above entitled cause is indebted to the plaintiffs therein in the sum of \$406.55, which amount is actually due, and that

---

---

Ross, Keen & Co. v. Steen—Opinion of Court.

---

---

the defendant does not reside within the limits of the State of Florida.”

The bond was signed (Ross, Keen & Co., by W. A. Blount,) and by sureties.

Defendant moved to dissolve the attachment for the want of such affidavit as is required by law, and for want of such bond as is required. The court sustained the motion and gave judgment dismissing the attachment. Plaintiffs bring error.

*W. A. Blount and John C. Avery* for Plaintiffs in Error.

*E. A. Perry* for Defendant in Error.

THE CHIEF-JUSTICE delivered the opinion of the court.

In an affidavit to procure an attachment against the property of a debtor, the elements of positiveness as to knowledge, information or belief, separately or altogether, required by the statute, must be substantially included in its terms. If one fact is required to be stated directly, and another may be stated on information and belief, there is no mistaking the intent of the statute that the first fact must be averred on something more than information and belief. Our statute requires that the party applying for an attachment, his agent or attorney shall first make oath in writing that the amount demanded is actually due, and also that he has reason to believe that the debtor will fraudulently part with his property, or is removing, or about to remove, &c. It would be a perversion of the terms and import of the statute to hold that the amount of the debt and the fact that it is actually due could be stated on information and belief only.

The authorities, almost without exception, agree that under a like statute the *fact* of the indebtedness must be stated upon something more convincing than hearsay. *Mitchell*



---

---

Ross, Keen & Co. v. Steen—Opinion of Court.

---

---

vs. Pitts, 61 Ala., 219, cited by appellants, and McNamara vs. Ellis, 14 Ind., 516, are the only cases we have been able to find which sustain the affidavit in the present case. Other cases in Alabama do not agree with it. Hall vs. Brazelton, 40 Ala., 406; Sims vs. Jacobson, 51 Ala., 186; Hall vs. Brazelton, 46 Ala., 359; Cobb vs. Force, 6 Ala., 468; Pickle's Adm. vs. Ezzell, 27 Ala., 623.

The Louisiana case cited, Bridges vs. Williams, 1 Martin, N. S., 98, is not at hand. The other case, Howell vs. Kingsbury, 15 Wis., 272, does not sustain the position contended for. In that case the affidavit stated the amount due, "all of which is stated upon information and belief derived from and founded upon the written admission of the defendants, now in deponent's possession." This was held to be sufficiently certain because the evidence producing the belief was such as would have been competent proof of the fact in a court of justice. We think this a proper rule in this State.

The books are full of the carcasses of slain attachment suits in which the statements in the affidavits are upon information and belief, where the statute required facts to be shown by direct statement. See Drake on Att., 5 Ed., §§ 106, 108, and notes.

The affidavit in this case was insufficient, and upon this ground the attachment was properly dismissed.

As to the bond signed in the name of the partnership firm only, we have had occasion to examine the question at the present term, and our conclusion, upon authority, is that a bond so signed bound all the parties who had authorized or subsequently ratified the signing either by deed or by parol, and that it was good under section 10 of the act of 1834. McClellan's Dig., 113, sec. 15; Jeffreys & Stribling vs. Coleman, *infra*.

The judgment is affirmed.

---

---

Dunbar v. Wright's Administrator—Opinion of Court.

---

---

WILLIAM H. DUNBAR, APPELLANT, VS. WRIGHT'S ADMINISTRATOR, APPELLEE.

1. Books of account, when offered in evidence, are in the first instance submitted to the inspection of the court, and if from such inspection they do not appear to have been honestly and fairly kept, they are to be excluded from the consideration of the jury.
2. If upon an inspection of a book of accounts brought up in the record, this court cannot see that the court below, in excluding such book, exceeded its authority or discretion, it will not reverse the judgment of such court.

Appeal from the Circuit Court for Escambia county.

The facts of the case are stated in the opinion.

*Charles B. Parkhill* and *E. A. Perry* for Appellants.

*W. A. Blount* for Appellee.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

The plaintiff, Wm. H. Dunbar, brought his action against E. Haines, as administrator *de bonis non* of the estate of Joseph Wright, deceased, to recover an indebtedness of Wright to the said Dunbar. Attached to the declaration was a bill of particulars of the plaintiff's demand, amounting to one hundred and seventy-one dollars and seventy cents. Plea and replication were filed and the issue was tried at the December term of the court held in and for Escambia county, A. D. 1883. The judgment was for the defendant, and the plaintiff below brings his appeal. A motion for a new trial was duly made, and was overruled, and an exception taken.

The errors assigned are as follows:

- I. The court erred in holding the book of accounts no

---

---

Dunbar v. Wright's Administrator—Opinion of Court.

---

---

admissible in evidence under the statute, and in withholding the book of accounts from the jury, and in judging of the credibility of the proffered testimony.

II. The court erred in not granting a new trial of the cause upon the motion of the plaintiff below.

III. That the court erred in giving the judgment.

The record shows the facts as they appeared on the trial to be as follows: The plaintiff "produced and offered in evidence a certain book claiming to be a book of account, kept by said plaintiff, and alleged by plaintiff to contain the entries of indebtedness claimed by him for the whole amount of such indebtedness, and plaintiff proffered oath that the book referred to is the book kept by said plaintiff, and contains the original entries, and were made at the time of the original transactions with Joseph Wright. Thereupon the defendant, by his attorney, objected to the introduction of said proffered oath of said plaintiff, which objection the court sustained, and this being the only evidence for the plaintiff the jury gave a verdict for the defendant." It appears from a subsequent order of the Circuit Court, permitting the record to be so amended, (which order is consented to by the attorney for the appellee as well as the appellant,) that the plaintiff duly excepted to the ruling of the court in excluding such proffered evidence and oath of the plaintiff.

The question which arises on this state of facts is, did the court err in excluding the book of account, containing what is claimed to be original entries, made at the time of the transactions with Joseph Wright, the intestate, and the evidence of the plaintiff to prove the book.

The law upon the subject of admitting original books of account as evidence is as follows: "In all suits or actions at law, or in equity in this State, the shop book and books of account of either party, in which the charges and en-

---

---

Dunbar v. Wright's Administrator—Opinion of Court.

---

---

tries shall have been originally made, shall be admissible in evidence in favor of such party: *Provided, however,* That the credibility of such evidence shall be judged of by the jury in case of a trial at law, and by the court in case of a hearing in equity." McC. Dig., 516, §15. This law was passed and approved in 1854, subsequent to the decision of this court in the case of Higgs vs. Sheehee, 4 Fla., 382.

In the year 1856, this court in the case of Hooker vs. Johnson, 6 Fla., 730, in commenting upon the change in the law, gives a construction of it as follows: "In this state of uncertainty in our own State, as to whether the rigid and strict rule shall prevail, or the more relaxed one existing in other States, it was appropriate for the Legislature to assert the true law and thereby terminate the difficulties. This they have done by the law under consideration. They declare that the relaxed rule shall prevail that books shall be evidence, not absolutely, but with the qualification that 'the entries and charges in it shall have been originally made,' by which we understand that there must be proof adduced to show, in the first instance, that they were so made. We think also that the law does not confine the privilege to merchants, but extends to either party in all suits and actions, whether merchants or not."

But the question involved in this case has been settled by this court in Robinson vs. Dibble, 17 Fla., 457. In that case this court says: "While there is a difference in the decisions of the courts of other States upon the point, whether this is a matter for the judge or the jury, this court has expressed the opinion that before the books of the party can be admitted in evidence they are to be submitted to the inspection of the court, and if they do not appear to have been honestly and fairly kept they are excluded, and if they appear manifestly erased in a material part, they will not be admitted unless the alteration is ex-

---

---

Dunbar v. Wright's Administrator—Opinion of Court.

---

---

plained." The book in this case was properly submitted to the judge, and by him, after an inspection, was excluded. It is here in the record. The account against Joseph Wright is scattered over seven pages, with no intervening charges against any one, all apparently in one handwriting, written with a pencil, the first item being dated February 18, 1874, and the last one March 1, 1881. There are nine items in all. The first reads as follows: "February 18, 1874. Sold to Joseph Wright, one lot for 175 dollars. Received from Joseph Wright, cash \$50.00." The last one reads: "March 1, 1881. Paid Dr. Fordham for Louise and Julia \$5.00, by order of Joe Wright."

The other items are for money loaned, for rent for his sisters board and washing and sewing.

In Cogswell vs. Dolliver, 2 Mass., 217, Sedgwick, J., says: "The true ground of admitting the books of the party in evidence, as a foundation for the suppletory evidence of the oath of the party, I have always understood to be, that the judge or court before whom the case is tried should, on inspection, determine that the book was proper for that purpose, and that such determination renders it competent evidence." 1 Greenleaf on Ev., §118, note 2.

We cannot say that the court below erred in the exercise of its discretion in excluding the book. The items have the appearance of being made at the same time, and the first one of date of February, 1874, is as fresh and legible, although written in pencil, as that of the late date in 1881.

It is not necessary to examine the other error assigned, as the view we have taken above is conclusive of the case.

The judgment must be affirmed.

---

P. & A. R. R. Company v. Atkinson—Argument of Counsel.

---

THE PENSACOLA AND ATLANTIC RAILROAD COMPANY, APPELLANT, VS. WAYNE K. ATKINSON, APPELLEE.

1. Declaration alleging that defendant employed plaintiff as civil engineer to take charge of construction of a road and authorized him to employ and hire teams and transportation in the course of such employment at defendant's expense, and plaintiff employed teams and paid for teams, &c., in the performance of his duties, is not demurrable. Such contract entitles him to be reimbursed for reasonable outlay for means of transportation.
2. Letters written by the Chief Engineer of a railroad company, not being of the *res gestae*, are not admissible in evidence in favor of the company.
3. Testimony as to what expenses were necessary to be incurred by an engineer upon one section of a road in its construction, is not competent to show what outlay was proper upon another section, there being no evidence that the conditions were the same on both sections.
4. The statute requires that a Judge shall give or refuse to give to the jury such instructions as may be proposed by counsel, as proposed. An alteration of such instructions by the Judge, who then gives them to the jury as amended, is a refusal to give them as proposed and is error, if the instruction in either form is material, and the jury may be misled to the injury of the party excepting. If the instruction is not pertinent to the evidence there can be no error in refusing it.

Appeal from the Circuit Court for Jackson county.

The facts of the case are stated in the opinion.

*J. F. McClellan* for Appellant.

1st Error. The court should have sustained the demurrer of defendant to the first and second counts of plaintiff's declaration. They are neither special or general indebtedness counts. The first count states that defendant employed plaintiff as an engineer on a part of defendant's line of road and authorized him to hire teams, hacks, &c., for his trans-

---

---

P. & A. R. R. Company v. Atkinson—Argument of Counsel.

---

---

portation, and that he did hire them. These facts would have given the parties from whom the teams were hired here a right of action against defendant, but no right of action by plaintiff against defendant.

2d Count. The second count alleges that defendant was indebted to plaintiff for the use and benefit of defendant at defendant's request for hire of horses, buggies and for transportation of plaintiff while in the employment of defendant as civil engineer. Does this give him the right of action? I think not.

2d. Error. The court struck out a plea of defendant on the ground that it was not sworn to by defendant or their agent or attorney. The defendant is a corporation and the plea was sworn to by C. A. Davies, who styles himself principal engineer of defendant.

The 15th rule says pleas shall be sworn to by the defendant, his agent or attorney.

I submit that a principal engineer of a railroad corporation is its agent. All its officers are agents.

The third and fourth errors should be sustained. This suit is brought by plaintiff against defendant to recover \$134.50 money the plaintiff paid as civil engineer of the line of road of defendant for transportation by hacks, buggies, horses and for himself and men for the months of November and December, 1881, and for January, February, March and April, 1882. The plaintiff in his evidence testifies that his transportation on his residency for that period was \$173.50, and that defendant paid of this bill \$40, leaving \$134.50 due him. He gives his evidence that he was employed for defendant by A. W. Gloster, defendant's chief engineer. That he was to have \$100 per month and all the transportation he wanted. And again he says: "I paid that bill in full. It was contracted by me for me and my assistants, and was necessary." Again he says, when

---



---

P. & A. R. R. Company v. Atkinson—Argument of Counsel

---



---

being interrogated as to Captain Gloster's letter to says "yes, I received that letter, but A. W. Gloster that told me that he was all the time in favor of my bill, the bill in suit here." The plaintiff's counsel objected to the reading of the letters of A. W. Gloster chief engineer of defendant, written June 6th and July 1882, to the jury. They were addressed to plaintiff were upon the subject matter of this suit. Therefore they were relevant. They were verbal facts. They bore the main point as to whether the bill of plaintiff was reasonable. A case very much in point is that of *Beaumont Taylor*, 1 Wall., 637; 16 How., U. S., 14.

5th Error. The witness, Mathews, was a civil engineer on the 25 miles of the Pensacola and Atlantic Road west of that of plaintiff.

The question asked Mathews was proper, as it is answered would have had a tendency to prove whether plaintiff's bill was reasonable or not.

6th Error assigned. The court should have granted a new trial upon the sworn errors above signed and assigned. The verdict is not supported by the evidence and is excessive. The verdict of the jury is rendered for \$133.50 principal, and interest \$3.41, equal to \$136.91. Now the particulars filed in the case is for livery bill that plaintiff contracted with J. H. Callaway & Co. for November, 1881, is \$12.50; for November, 1881, with H. D. King & Co. \$42.50; December, 1881, \$42.50; January, 1882, \$9.50; February, \$38.75; March, \$43.75; April, \$16.50; aggregate, \$136.91. Credited November 27th with payment of Callaway & Co. bill, \$12.50, and January to H. D. King & Co., \$27.50, aggregating \$40, and leaving a balance of \$133.75. Plaintiff says he paid this bill, defendant refusing to pay it. Plaintiff says the bill was for transportation for himself and passengers under him as a civil engineer on road of defendant.



---

---

P. & A. R. R. Company v. Atkinson—Argument of Counsel.

---

---

The defendant pleads a set off of \$67.95, and I think plaintiff's evidence sustains it and more. Upon the subject of the payments and receipts by plaintiff to defendant the evidence is somewhat conflicting. The plaintiff on his evidence in chief says \$40 had been paid on the bill. Then he says railroad paid me and I paid livery bill. In November I paid \$12.50, December \$27.50, bill was \$50.50, left \$22.50. On his cross examination he admits he receipted to defendant for \$4 for November, \$23.50 for December, \$26 for January, \$8 February, \$4.50, aggregating \$66.50 paid instead of \$40, and leaving a balance on bill of \$107.50 instead of \$133.50, a difference of \$26. He then attempts to explain that the \$26 paid in December is not in his bill, and that the voucher for \$8 he did not understand to be for transportation but for stationery or something of that kind. The vouchers for \$4 and for \$4.50 are credited by him in the credit of \$27.50 of his bill.

This is not a satisfactory explanation. In his bill he sues for a balance for December of \$42.50, and admits he was paid \$27.50, says whole bill was \$50.50 for December. If he sues for \$42.50 and was paid besides \$27.50, the two items make \$70. He is notified January 10, 1882, by Gloucester that in the future he "must get along without so expensive a livery bill." Yet he sues for a balance of \$9.50 for January, for February \$37.75, March \$43.75, April \$16.50. All this transportation was not reasonable and necessary. He puts it upon the ground of the bad condition of his part of the road to which he was assigned and owing to his predecessor being sick. He went on the line of the road in November, and his bill for transportation was only \$50.50 for December he says. He should by January 1st have brought up the work, and doubtless did, as his bill for January was only \$17.50. In February he runs up to

---



---

P. & A. R. R. Company v. Atkinson—Opinion of Court.

---



---

\$38.75, March to \$43.75. On 5th of April he is again told his bills are unreasonable and it is put at \$16.50.

The verdict is excessive and unsupported by the evidence and should be set aside.

*Liddon & Carter* for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

Atkinson sued appellant for money paid out at its request and to its use and recovered a judgment from which an appeal is taken.

The first count alleges that in November, 1881, plaintiff was employed by defendant as a civil engineer, to take the charge and supervision of its road, then being constructed, and was authorized and instructed to employ and hire teams and vehicles for his transportation while engaged in such employment at defendant's expense, and defendant promised to pay the same each month, and that under such agreement plaintiff hired teams and vehicles for his transportation in the performance of his duties as engineer to the amount of \$173.50, which plaintiff paid, and defendant paid forty dollars thereof, leaving unpaid \$134.60, which remains due him.

The second count alleges that defendant is indebted to plaintiff in the sum of \$134.60 for money used and expended by him for the use and benefit of defendant and at defendant's request, for the hire of teams and transportation while engaged in the employment of defendant as a civil engineer supervising the construction of its railroad.

Defendant demurred to these counts, that they do not show a cause of action in favor of plaintiff; that the first count states facts which give a cause of action to the parties letting teams, &c., but not to plaintiff. The court overruled the demurrer and this ruling is assigned as error.

---

---

P. & A. R. R. Company v. Atkinson—Opinion of Court.

---

---

We consider the contract as stated in the first count sufficient to enable plaintiff to recover for money paid by him for means of transportation in the course of his duties, even though the owners of teams, &c., may have had a right of recovery against the company for the transportation furnished to him, if he had not paid it. The contract was made with him to pay for his transportation and any reasonable amount he paid out therefore comes within the terms of the agreement, to be paid by the company. By the same rule the second count is good and the ruling of the court was correct.

The defendant then pleaded the general issue to all the counts and a further plea admitting that it did employ plaintiff as a local engineer as alleged, to discharge his duties under the direction of the chief engineer, and that plaintiff was only authorized to contract for and use such transportation as the chief engineer deemed necessary and would allow, and avers that defendant has fully paid for all the transportation allowed plaintiff by the chief engineer, amounting to \$67.95.

Plaintiff took issue upon the plea and the cause was tried by a jury. The plaintiff proved the agreement stated, and that the amount paid by him for such means of transportation was \$173.50, of which he had been paid \$40. The president of the company sent him to Gloster, its chief engineer, for employment as an engineer, who employed him at \$100 per month, and all the transportation he wanted in the performance of his duties.

The defendant offered in evidence three letters written to plaintiff by A. W. Gloster, chief engineer of defendant, in regard to the charges for transportation, and the agreement in relation to such charges. These letters were dated respectively January 10, June 6, and July 31, 1882, after the date of the last item of plaintiff's account. The letter of

---



---

P. & A. R. R. Company v. Atkinson—Opinion of Court.

---



---

January 10, 1882, was read, in which Gloster writes plaintiff, "you must try and get along without so expensive livery bill in the future."

The letter of June 6, is of similar import, and says plaintiff "you received pay on your vouchers for all that you could expect to get pay for." This letter was read to the jury. The letter of July 31 was excluded under objection. Such letter cannot be deemed legal evidence. The engineer was a competent witness and his letters in favor of the company, not being of the *res gestae* are mere declarations of a party in his own favor. The exception to this ruling was not well taken.

Defendant excepted to the refusal of the court to permit Mathews, an engineer, to testify as to the amount of the livery bill for transportation on another portion of the road under his charge. Mathews had testified that he knew nothing of the condition of plaintiff's part of the road. The testimony offered was properly excluded.

Defendant's counsel asked the court to charge, among other things, as follows: "If you believe, from the evidence, that Gloster had no authority to make the contract claimed, he made as the agent of defendant, and that the defendant repudiated such contract, then you will find for defendant." The court gave the instruction after inserting the words "because of such want of authority," following the word "contract" last written, and defendant excepted to this qualification.

The statute requires that the court shall declare in writing to the jury his ruling upon instructions proposed by counsel, "as presented and pronounce the same to the jury as given or refused." The action of the court was equivalent to refusing the instruction as presented. This would have been error if the alteration had essentially changed the force of the instruction asked for, and if the instruction

---

---

West v. Blackshear & Co.—Syllabus.

---

---

ad been pertinent. There was no testimony in the case tending to show that defendant had repudiated the contract made by Gloster, the chief engineer, with plaintiff. On the contrary, the company had paid plaintiff his salary and part of his expenses of transportation according to the contract, and had repudiated a part by refusing to pay it after the expense had been incurred. There was no repudiation of the contract by the defendant or by its engineer, and no attempt to do so.

The last point in the assignment of errors is the refusal to grant a new trial. It is claimed that the damages were excessive, because it was shown that the plaintiff had been paid some \$26 more than was allowed by the jury. The evidence, however, shows that the items so paid are not included in the plaintiff's claim against defendant, and this payment was not applicable to the claim sued for but was payment by the company to Calhoun, a livery keeper. This is our understanding of the testimony as given to the jury. We fail to discover any error in the finding of the jury, vitiating the verdict.

The judgment is affirmed.

---

THEOPHILUS WEST, APPELLANT, vs. E. J. BLACKSHEAR & Co., APPELLEES.

A declaration setting out the facts that the plaintiffs on a certain day, at defendant's request, let to hire and delivered to the defendant a certain horse, the defendant promising to use the same in a careful, moderate and reasonable manner while he so had him on hire, but alleging that he did not use the horse in a careful, moderate and reasonable manner, and that by reason of negli-

---

---

West v. Blackshear & Co.—Statement of Case.

---

---

gence and carelessness on the part of the defendant, the horse ran away and became injured, damaged, sick and worthless, and the declaration upon a contract of bailment, and the liability of the defendant arises out of such contract.

2. An action of this character, upon such contract of bailment, may be maintained against the bailee for any neglect or breach of duty by which the bailors were damaged.
3. The question of negligence being one of fact, is peculiarly for the jury. The evidence in this case was conflicting, and the jury having found by their verdict that the bailee was duly warned by the bailors of the fault or bad quality of the horse, it was his duty in the use of the horse to exercise such care and prudence as would ordinarily be required to guard against mishap from such fault of which he had been warned.
4. Common or ordinary diligence, in the sense of the law, is such as men of common prudence generally exercise about their own affairs.
5. An exception to the charge of the court to the jury that it is not in writing, must be taken at the time the charge is delivered. The parties may waive the formality of a written charge, and then cannot urge upon a motion for a new trial, or on an appeal to this court, for the first time, such omission. 17 Fla., 783.

Appeal from the Circuit Court for Jackson county.

Blackshear & Co. sued West for damages for injuries to their horse, occasioned by the defendant's negligence. The declaration contains two counts. The first count in substance alleges that the defendant, on or about the first day of December, A. D. 1882, hired from the plaintiff a horse and that while he had the same on hire, he treated it in such a careless and negligent manner that the horse became wounded, damaged, sick, lame, and deteriorated in value. The second count alleges that the defendant imprudently, carelessly and negligently left the horse unattended while harnessed to a vehicle, and carelessly and negligently left him insecurely fastened while harnessed to a vehicle, in consequence of which the horse ran away with the vehicle.

---

---

West v. Blackshear & Co.—Statement of Case.

---

---

attached to him, bruising, wounding and maiming himself, rendering himself sick and lame, and utterly worthless to the plaintiff, &c. To this declaration the defendant demurred. To the first count, the grounds of demurrer were: First. It does not allege the specific date of the injury. Second. There is no allegation of negligence. Third. The injury is not described; and fourth, not sufficient facts stated to give a right of action. To the second count the grounds of demurrer were: First. There was not a sufficient statement of facts to give a right of action. Second. It does not sufficiently set out the negligence of the defendant, nor the nature of the injuries the horse received. A general demurrer, upon the ground that the declaration does not state facts sufficient to constitute a right of action.

The demurrer was overruled by the court, and the defendant excepted. Issue was then joined, the cause came on to be tried at the May term of the court, A. D. 1883, and a verdict was rendered against the defendant. The attorney of the defendant moved for a new trial on the following grounds, to wit:

1st. The verdict is without evidence to support it.

2d. The verdict is against the preponderance of the evidence.

3d. The verdict of the jury is against the law.

4th. The court erred in refusing the charge to the jury asked to be given them by the defendant.

5th. The court erred in charging the jury, that if they believed from the evidence that the defendant was notified by the plaintiffs or their agents of any bad qualities of the horse, then the defendant would be bound to exercise that diligence that was necessary to guard against injury from the bad qualities.

6th. The defendant was only liable for gross negligence, or from acting *mala fides* in the use of the horse.

---



---

 West v. Blackshear & Co.—Opinion of Court.
 

---



---

7th. The court erred in not charging the jury in writing, as the statute prescribed.

8th. The court erred in not reducing his rulings upon the instructions asked by defendant's counsel to writing, and pronouncing the same as given or refused to the jury.

The motion for new trial was overruled, and the defendant excepted, and the judgment was entered for the plaintiffs. From this judgment the defendant brings his appeal, and assigns error as follows:

1st. The court erred in overruling defendant's demurre- to the first and second counts of plaintiffs' declaration.

2d. The court erred in all that part of the charge that defendant's counsel excepted to.

3d. The court erred in refusing to give the charge asked by defendant's counsel.

4th. The court erred in not granting the defendant a new trial on the ground set forth in the motion.

5th. The court erred in not reducing his rulings upon the instructions asked by defendant's counsel to writing, and pronouncing the same as given or refused to the jury.

6th. The court erred in not charging the jury in writing, as the statute prescribes.

*J. F. McClellan* for Appellant.

*Liddon & Carter* for Appellees.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the Court.

The first error assigned cannot be maintained. The specific date of the injury, as charged in the complaint, is of no consequence. The statement of the time of committing the injuries is seldom material; and in a case of this character, it may be proved to have been committed on a day



---

---

West v. Blackshear & Co.—Opinion of Court.

---

---

anterior or subsequent to that stated in the declaration. The declaration alleges "that the plaintiffs, on or about the first day of December, A. D. 1882, at the defendant's request, let to him, and delivered to defendant, a certain horse, &c." That in pursuance of such letting, the defendant promised to use the same in a careful, moderate and reasonable manner, while he had the same on hire. That defendant did not use the horse in a careful, moderate and reasonable manner, &c. This is an action on a contract, and the liability of the defendant arises out of a contract. There are two counts in the declaration, similar in effect. The second count more specifically describes the negligence of the defendant, in that he carelessly and negligently left the horse unattended and insecurely fastened while harnessed to a vehicle, in consequence of which carelessness and negligence the horse ran away with the vehicle, and was wounded and injured, and became lame, sick and worthless. The two counts are in assumpsit, upon a special contract of bailment setting out the promise and undertaking of the defendant, the consideration upon which it was founded, the breach of that promise by the defendant, his neglect and carelessness and the loss sustained by the plaintiffs. The declaration is fully sustained in every respect by the precedents and authorities.

An action of this character may be maintained against a bailee, upon the contract for bailment, for any neglect or breach of duty. 1 Chitty Pleadings, 16th Ed., 114; Ken-naird vs. Jones, 9 Grattan, 183; Ferrier vs. Wood, 9 Ark., 85; Story on Bailment, §§ 2, 3 and notes; 2 Chitty Plead., 16th Ed., 67, 144; Bank of Mobile vs. Huggins, 3 Ala., 206.

The court did not err in overruling the demurrer. An allegation of carelessness and negligence appears in both counts of the declaration. The injury was sufficiently de-

•

---

 West v. Blackshear & Co.—Opinion of Court.
 

---

scribed, and facts were stated to give the plaintiffs a right of action.

The next error assigned is to that part of the charge of the court reading as follows: "But the plaintiffs say further that if the horse was not in this respect such as they are required to keep for the public, the defendant was warned as to his qualities, and did not act in a way to guard against injury from these. As to this, I instruct you, if the defendant was warned of any bad quality of the horse, it was his duty in the use of him to exercise such additional care and prudence as would be required to guard against mishap from such bad quality. I do not mean that this would have been required of him unless he took the risk of driving the horse himself. I think if he did take the risk, he was bound to use that sufficient care which was made necessary by the warning." The evidence in this case, as appears from the records, is conflicting. Blackshear, one of the plaintiffs, testified that the horse was "gentle enough for ordinary purposes. He had no bad qualities whatever, except that he was a little nervous on being hitched, when you would pull the buggy upon him, and he would not stand hitched while fastened to a buggy. I always told every one who hired him to take him loose from the buggy when they stopped at a place." "He was nervous when you hitched him up and left him standing." John Anderson testified: "I delivered horse, and told Dr. West, Mr. Blackshear and Russ said take horse loose from the buggy when he stopped. He sent me after a halter to tie the horse. I gave Dr. West halter to tie the horse. I told West to take the horse out of the buggy when he stopped." W. W. Russ, one of the plaintiffs, testified: "I told Dr. West to be careful when he stopped at places, as he would not stand hitched to a buggy. I told Dr. West horse would not stand hitched, he was spirited,

---

---

West v. Blackshear & Co.—Opinion of Court.

---

---

had never been scared or run away. Horse was a little skittish and nervous.”

Hardy Holden testified: “I was at the stable when Dr. West came for a horse. I told him I had only two or three horses left. Would let him have Henry Jordan, the best horse in the stable, but that he must be careful to unhitch him when he stopped at a place. He said all right. He sent after a halter.”

The evidence shows the defendant received a rope to tie the horse with; that the rope was fastened about the neck of the horse, and then tied to a tree; that the horse reared up, ran backwards, kicked and ran away, receiving injuries, and that the horse when so tied was still hitched to the buggy.

On behalf of the defendant, Theodore West, son of the defendant, testified that he was standing in front of the drug store when Andrews brought the horse and buggy to his father. Defendant asked Andrews if the horse would stand tied, and Andrews said yes. The defendant then told him to bring a rope. That W. W. Russ was not present. Wm. McPherson testified that Andrews told the defendant in answer to a question, that the horse would stand tied; that the defendant told Andrews to bring him a rope, and a rope was brought. Did not see Russ there. The defendant himself then swore that he told Hardy Holden that he wanted a good horse, best, and a gentle horse. He asked him “if the horse would stand hitched to the buggy; he said yes. I told him to send me a rope to tie him with. He sent it by Brown Holden, a little boy. I hitched the horse to a tree with the rope furnished me by tying it to a tree and around horse’s neck.”

We cannot see, after an inspection of the evidence, that there was any error in the charge as excepted to. The rule of law is well settled that the hirer must re-deliver the

---

---

**West v. Blackshear & Co.—Opinion of Court.**

---

---

thing hired in good condition. That he is liable for negligence if such negligence be productive of damage to the owner, and he can only be relieved on account of such damage by showing that he was chargeable with no such negligence. The jury in effect have by their verdict found that the defendant was notified at the time of the hiring of the horse that he would not stand tied when hitched to a buggy, and that if he stopped he must be taken from the buggy to be tied. The injury to the horse was no extraordinary catastrophe, but resulted from the negligence of the defendant in the manner of his hitching, as the jury have found from the evidence, and not acting prudently in having the horse hitched to the buggy, after the notice which he had received from the bailors. The defendant, as the jury have found, was warned of the bad quality of the horse, and, as the court in its charge says, it was his duty in the use of him to exercise such additional care and prudence as would be required to guard against mishaps from such bad quality. Common or ordinary diligence, in the sense of the law, is such as men of common prudence generally exercise about their own affairs. Wharton's Law of Negligence, §713; Story on Bailments, §11, and cases cited. In this case the law required ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect.

Another error assigned is in the court's failure to charge the jury as requested by the defendant's counsel, that "to tie a horse that is hitched to a buggy to a tree with a good strong rope is not an act of negligence on the part of one who has hired the horse from a livery stable keeper or keepers, to be driven by a physician in his practice, and when calling to see one of his patients."

In this case, where there is conflicting evidence, the question of negligence is one of fact, and must be determined by

---

---

West v. Blackshear & Co.—Opinion of Court.

---

---

the jury. "The witness is asked, not whether A was negligent at a particular juncture, but what were the facts of the case, and from these, negligence, if there be any, is inferred. Now, negligence may be disputed when the facts are undisputed, and the question in such a case, when the dispute is real and serious, is eminently one for the jury, under the direction of the court." Wharton's Law of Negligence, §420, and cases cited. In Gaynor vs. Old Colony & N. B. Co., 100 Mass., 208, the court say, speaking of negligence: "What is ordinary care in such cases, even though the facts are undisputed, is peculiarly a question of fact, to be determined by the jury under proper instruction. It is the judgment and experience of the jury, and not of the Judge, which is to be appealed to." The facts were all before the jury. The court had charged them fully upon the question of negligence, and it was for them to determine, under all the circumstances of the case, the very question which counsel asked the court to determine, to wit: "That there was no negligence in thus tieing the horse hitched to a buggy to the tree." We think there was, therefore, no error in the court's refusing so to charge.

The next error assigned is in not reducing the rulings upon the instruction cited by defendant's counsel to writing, and pronouncing the same as given or refused, to the jury. There is no evidence in the record that the court did not reduce his rulings to writing and pronounce the same to the jury. The bill of exceptions says: "The Judge charged the jury orally, which after adjournment he reduced to writing, which is in the words following, to wit:" Embodied in that written charge appears the request of the defendant's counsel that the court should charge in the language used in the last above assigned error. At the foot of this the Judge certifies under his hand and seal that he re-

---

---

West v. Blackshear & Co.—Opinion of Court.

---

---

fused the instruction so asked by the counsel, and the defendant excepted.

The ruling of the court appears to be in writing, signed and sealed, and is attached to and made a part of the record of the court, as embodied in the bill of exceptions. *vs. State*, 18 Fla., 890. Aside from this fact, no exception seems to have been taken to the oral charge of the judge afterwards reduced to writing, or to the refusal, orally made, to the request for such instruction by defense counsel. This error, if error there was, seems to have been cured by the acts of the defendant's counsel. If he had excepted to the action of the court, the omission could probably have been cured. The jury could have been recalled, and the instructions would have been reduced to writing and repeated to them. In the case of *Southern Express Co. vs. Van Meter*, 17 Fla., 783, this court has fully determined this question. It says: "We think the rule in a case of this character is that a party cannot by his silence in the Circuit Court, waive the failure of the Judge to put his instructions in writing, or to sign and seal them, or to do other merely formal acts of this character, and after having his chance before the jury, urge a motion for a new trial, or here, for the first time, his exception." Had the defendant excepted, as it was his right to do, at the proper time, there was an opportunity for the court to correct the supposed error at once but he did not now, after having failed to succeed, avail himself of a motion for a new trial, or here, for the first time, his exception which might have been easily removed. *Collier vs. Scheffer* vs. Hayes, 16 Fla., 370.

The last error assigned is that the court erred in not charging the jury in writing, as the statute prescribes. Before said, the bill of exceptions contains the instructions given to the jury in writing, although it says they were given to the jury orally, and subsequently reduced to writing.

---

---

**Blanchard and Burrus v. Raines' Executrix—Syllabus.**

---

---

**There** seems to have been no objection to this course by **either** party, and no exception thereto was taken. What **we** have said above is an answer to this alleged error, under **the** previous decisions of this court. The counsel for **appellees** claim in their argument that the law of 1877, directing **that** the charge of the court shall be wholly in writing, is **directory** merely, and not mandatory. This court have **said** the act was mandatory. *Baker vs. State of Florida*, 17 Fla., 406. Yet the omission must be excepted to, or it **will** not avail the appellant. 17 Fla., 783. In this case **the** bill of exceptions contains the charge of the Judge, duly **signed** and sealed by him.

The judgment of the court below must be affirmed.

---

**THOMAS E. BLANCHARD AND LAWRENCE M. BURRUS, APPELLANTS, VS. RAINES' EXECUTRIX, APPELLEE.**

1. The act of March 11, 1879, Chapter 3131, and the act of February 22, 1881, Chapter 3247, providing a summary proceeding by warrant of distress for securing the rents due to and the advances made by the landlord or at his request, by which the property liable to seizure is levied upon without personal notice to the tenant, is not in conflict with the constitutional provisions which secure the right of trial by jury, and declare that no person shall be deprived of property without due process of law. The acts provide that the tenant may have the matters in dispute tried by a jury on replevying the property and tendering an issue.
2. The forms of administering justice and the powers of the courts are subjects of legislative control.
3. Where a proceeding is substantially a proceeding *in rem*, a seizure of property in the possession of the owner for the enforcement of a lien upon it, is held to be sufficient notice to the owner, if no other notice is required by the statute.

---

 Blanchard and Burrus v. Raines' Executrix—Opinion of Court.
 

---

4. The statute giving a lien and remedy to the landlord for rent and ~~and~~ advances enters into and forms part of the agreement for leasing.
5. The provision of the Constitution that "the right of trial by jury shall remain inviolate" does not confer a right to a jury trial where the right did not before exist, but secures the right against abridgement in case where it existed prior to the adoption of ~~the~~ the Constitution. There is no infringement so long as the right is not directly or indirectly denied.
6. A note promising to pay a sum of money for rent of land to which is appended a stipulation that if this note and another for the ~~same~~ amount shall be promptly paid when due the payee shall ~~make~~ title to the land to the maker of the notes, otherwise the ~~amount~~ to be deemed as rent only is but a promise to pay rent, ~~which~~ which may become purchase money upon full compliance by the lessee—
7. The landlord's lien for rent and advances as provided by the ~~acts~~ of 1879 and 1881 may be enforced by a single distress warrant, covering both claims; the claim for advances being a lien upon the crop only while the lien for rent may be satisfied out of ~~the~~ the crop and other property kept on the premises.

Appeal from the Circuit Court for Jackson county.

The facts of the case are stated in the opinion.

*Liddon & Carter* for Appellants.

*J. F. McClellan* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

Distress for rent, &c. This case arises under Chapter 3131, Act of March 11, 1879, and Chapter 3247, Act of February 22, 1881. Section 1 of ch. 3131, declares that all claims for rent shall be a lien on agricultural products raised on the land rented, and on all other property of the lessee kept on the premises. The second section provides that if any person to whom any rent may be due, his agent or attorney, shall make affidavit before the Clerk of the Circuit Court of the county in which the land rented lies, stating the amount or quality and value of the rent due for



---

---

**Blanchard and Burrus v. Raines' Executrix—Opinion of Court.**

---

---

**such** land, it shall be the duty of the Clerk to issue a **distress** warrant, directed to the Sheriff, commanding him to **levy** on the property of the defendant, or that may be **liable** for rent, and collect the rent claimed in the affidavit, **or** the value thereof. The officer receiving such warrant **shall** immediately levy on sufficient of the property liable **to** the rent claim to pay the rent due, and interest and costs. **By** section three "the party distrained shall have the right **to** replevy the property so taken, by making oath that the **rent**, or any part thereof, claimed, is not due, and giving **bond** with good and sufficient sureties, conditioned for the **payment** of the amount or value of the rent which upon **the** trial may be found to be due," &c. The fourth section **provides** that in case the property levied on shall be **replevied**, it shall be the duty of the officer to return all the **papers** to the clerk, and a jury shall be sworn to try the issue, **without** other pleadings, and in case of a verdict for the **plaintiff**, judgment shall be rendered for the amount or **value** of the rental, with interest and costs, and execution **shall** issue thereon, as in other cases; and a right of appeal **is** given. Section five provides that if the property is not **replevied** within ten days it may be sold, and the proceeds **applied** to the payment of rent and costs, the property to **be** advertised ten days, in the manner provided by law in **cases** of sale on execution. By section eight, the proceedings may be had as against the lessee, his executor or assigns.

By Chapter 3247 it is provided that landlords shall have a lien on the crop grown on land rented for the rent of the current year, and for advances made in money or other things of value, whether made directly by them or at their instance and request by another person, or for which they have assumed the legal responsibility, at or before the time at which such advances were made, for the sustenance and

---

 Blanchard and Burrus v. Raines' Executrix—Opinion of Court.
 

---

well-being of the tenant and his family, for preparing the ground for cultivation, or for cultivating, gathering, saving, handling or preparing the crop for market. Further, that the liens created by the above section may be enforced in the same manner and by the remedies provided by Chapter 3131, above mentioned.

The agent of Blanchard & Burrus made oath before the Clerk of the Circuit Court for Jackson county, that Susan Robinson, executrix, &c., of W. S. Raines, was indebted to them in the sum of two hundred dollars for rent, for 1883, of certain described lands, payable in money, and actually due. Also that said executrix is also indebted to the firm of Liddon & Co., for advances made by Liddon & Co., to said W. S. Raines in his life time, and to said Susan Robinson as his executrix since his death, of goods, &c., advanced by Liddon & Co., at the instance of Blanchard & Burrus, for the sustenance of said Raines, and for cultivating, gathering, saving, handling and preparing for market, the crop raised on the lands mentioned, during the current year, to the amount of \$142.55, which is due and unpaid.

Annexed to the affidavit is a paper reading as follows:

"\$200. Jackson county, Fla., Dec. 26, 1882. On Oct. 1st, 1883, I promise to pay Blanchard & Burrus or order two hundred dollars for rent for 1883, of 154.15 acres of land in said county, to wit: Lots 6 and 7 in section 20, township 5, range 7, north and west. If this note is promptly paid when due, and I also pay another note for same amount on October 1st, 1884, then they are to make me titles to said land; otherwise, on failure to pay promptly, all payments to go for rent only, and land still to remain property of said Blanchard & Burrus. Witness my hand and seal.

"W. S. RAINES. [L. s.]

"Witness, C. C. LIDDON."

On filing this affidavit the clerk issued a distress warrant

---

---

**Blanchard and Burrus v. Raines' Executrix—Opinion of Court.**

---

---

**under** the seal of the Circuit Court, directing the sheriff to **levy** upon and take possession of the property of the said **Susan Robinson**, as executrix, &c., of Raines, that may **be** liable for rent and advances claimed, and collect, &c. **The** sheriff levied upon certain cotton and horses as liable **for** the rent.

Susan Robinson filed her affidavit denying that she is the **executrix**, &c., and denying the indebtedness as claimed. **She** also gave a replevin bond, and the property was **re-**  
**leased** by the sheriff.

At the ensuing term of the Circuit Court the said Susan **Robinson** made a motion to quash the writ of distress upon **the** following grounds:

1. That the affidavit upon which it issued is insufficient.
- 2.** The amount claimed to be due, upon which the writ of **distress** issued, is not for rent or advances contemplated by **the** statute.
3. The writ is void because it is not made **re-**  
**turnable** to rule day, and because it does not require any **one** to be served with the writ.

The court granted the motion and dismissed the case. **From** this judgment claimants appeal.

1. The affidavit is sufficient under the terms of the act. **It** asserts that an amount of money is due for rent to the **claimants** as landlords, for the year then current, from the **executrix**, as such, and describes the land. This is **suffi-**  
**cient** as to the rent. The affidavit also states that there is due and unpaid an account for goods, &c., furnished to Raines and to the executrix for sustenance, and for making and gathering crops on the land, to the amount of \$142.55, by Liddon & Co., at the instance of Blanchard & Burrus. These statements are made in the precise language of the statute. We see no objection to joining the two matters of rent and supplies, as the proceedings are controlled by the same rules, and are in behalf of and for the protection of

---

**Blanchard and Burrus v. Raines' Executrix—Opinion of Court.**

---

Blanchard & Burrus, as landlords, at whose instance, it is stated, the supplies were furnished by Liddon & Co. Blanchard & Burrus are the parties claiming the liens, both for rent and supplies. The tenant, however, may require that the claim for advances shall be satisfied out of the crops only; while the claim for rent is a lien upon the crops, and also on other property of the tenant, kept on the premises.

2. The second ground is equally untenable. It is argued that the note appended to the affidavit and the contract embodied in it, show that the money named is purchase-money, and not rent. The note, however, expressly names the \$200 as rent for 1883, and mentions another note of \$200 due in 1884, and says that if both notes are promptly paid when due, then Blanchard & Burrus "are to make me titles to said land," but if not so paid promptly, then "all payments to go for rent only." And so, by the terms and intent of the contract, all payments were to be accounted as rent unless the payments were promptly made. It does not charge the character of the agreement to pay rent, that the tenant may at the end of the time claim a conveyance of the land, having made prompt payment of the notes as per contract.

3. The third ground embraces two propositions, the first of which is that the writ was not returnable to a rule day. To this it is only necessary to remark that a distress warrant is not a process by which a suit is commenced, within the meaning or the practice acts. It is a special proceeding, devised by law for the enforcement of a specific statutory lien upon the crops and other property on the premises, for rent and supplies furnished by the landlord or upon his credit, for the benefit of the tenant. No "rule day" is contemplated by the statute, and it would be inconsistent with the summary character of the proceeding.

---

---

Blanchard and Burrus v. Raines' Executrix—Opinion of Court.

---

---

The remaining proposition is that the proceeding is void because "no notice is required to be served with the writ." The statute does not require personal notice or publication, and it is insisted that for this reason it is inoperative to authorize this summary process, because it condemns without a trial by jury, and deprives the owner of his property without due process of law; all which is said to be in conflict with the third and eighth sections of the Bill of Rights of the Constitution of the State, and the 14th Amendment of the Constitution of the United States.

It is said that this court, in the case of Flint River Steamboat Company vs. Roberts, 2 Fla., 102, has decided the very question against the validity of the act. That case arose out of proceedings under an act of the Legislature approved January 4, 1847, found in Thomp. Dig., 414, which provided that persons furnishing labor or materials to any water craft navigating the Apalachicola river, might make an affidavit of the amount due for labor or materials before the Circuit Judge, whereupon the Judge shall order the Clerk of the Court to enter up judgment for the amount so sworn to, and the clerk was required forthwith to issue an execution against the owner of the boat, and the sheriff was required to seize the boat and advertise it for sale. No notice to the owner was required to be given before judgment or seizure, and no notice at any time other than the seizure by the sheriff and advertising for sale. There was a provision that the owner might deny and contest the claim, and obtain release of the property by giving bond, after which the execution shall be returned into court with the other papers, and the issue tried by a jury. The court held in that case that the judgment was unwarranted, and the statute authorizing it void, because it did not provide for summons, notice or appearance, or a jury trial, *before judgment*. In Georgia a like

---

 Blanchard and Burrus v. Raines' Executrix—Opinion of Court.
 

---

statute was upheld, on the ground that a right of trial by jury was given to the owner, if he chose to avail himself of it; and though the remedy provided might be inconvenient, yet all the rights of parties were protected by means provided by the statute. *Flint River Steamboat Co. vs. Foster*, 5 Ga., 194, Lumpkin, J.

The proceeding by warrant of distress for rent of land is of very ancient origin, and notice before seizure was unnecessary. Addison on Torts, Dudley & Baylies' Ed., 662. In *Tancred vs. Leyland*, 16 Ad. & E., n. s., 669, 680, it was argued that the common law casts a duty on the landlord distraining to inform the tenant what is the arrear of rent for which he distrains. Parks, B., for the court, says: "We think that the common law casts no such obligation on the distrainor. It has been expressly laid down that if the lord distrain for rents or services he has no occasion to give notice to the tenant for what thing he distrains; for the tenant, by intendment, knows what things are in arrears for his lands, (1 Rol. Abr., 674); and the authority for this is Year B. Parch., 453, E. 3, when Lord Chief-Justice Fyncheden, in answer to the argument that the lord, on the taking of a distress, ought to give notice to the tenant of the cause of the taking, says it is not so, for the tenant is always held by common intendment, to know what things are in arrear from his land, as rent and service, &c. This was adopted by Lord Ch. B. Gilbert."

The landlord could distrain in his own name, or employ a bailiff or servant to distrain for him. And the effect of it is to compel the tenant either to replevy the distress and contest the taking, in an action against the distrainor, or to compound or pay the debt or duty. Tomlin's Law Dict., tit. *Distress*.

Our statute adopts the common law right of distress for rent, but requires the landlord to make oath to the amount

---

---

Blanchard and Burrus v. Raines' Executrix—Opinion of Court.

---

---

**due.** It has further provided that the landlord shall have **a** like lien upon crops for the price or value of supplies **and** advances made by him, or under his order, to the **tenant**, to enable him to make and harvest his crops. The **contract** of leasing is made under these conditions imposed **by** the statute, and of course the statute enters into and **forms** part of the contract, regulating and limiting the **rights** and duties of each party. This statute, as before **re-**  
**marked**, makes the rent and advances a specific lien upon **the** property mentioned, and thereby the landlord has a **right** of property in the crops, &c., which he is by the act **authorized** to foreclose by seizure and sale in the manner **prescribed**.

As to the question of notice, it is true that a statute **which** should authorize a debt or damages to be adjudged **against** a person upon purely *ex parte* proceedings, without **a** pretense of notice, or any provision for defending, would **be** a violation of the Constitution, and void; yet where the **Legislature** has prescribed a kind of notice by which it is **reasonably** probable that the party proceeded against will **be** apprised of what is going on against him, and an opportunity is afforded him to defend, the courts should not **pronounce** the proceeding illegal. Matter of Empire City **Bank**, 18 N. Y., 200, 215.

In many of the States, under their statutes, the practice of foreclosing mortgages of real or personal property by **ad-**  
**vertising** the property for sale, and without other notice **than** notice of sale, has prevailed, and titles under such **sales** have been sustained, the statute authorizing it being **part** of the contract of mortgage or pledge. 18 N. Y., 215; Flint R. St. Co. vs. Foster, 5 Geo., 194, 204. In Pennoyer vs. Neff, 95 U. S., 714, 727, Field, J., delivering the opinion of the court, says: "The law assumes that property is **al-**  
**ways** in the possession of its owner, in person or by agent,

---

 Blanchard and Burrus v. Raines' Executrix—Opinion of Court.
 

---

and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*."

In the present case the Legislature has not provided that any service be made of a distress warrant except the seizure of the property against which the lien is declared to exist, and no personal judgment results. Virtually, the landlord takes the possession of the property in which he has an interest from the possession of the tenant, in pursuance of the contract of leasing, which contract embraces a consent that the possession may be so taken in default of payment. The Legislature has thus enacted that the service of the warrant by seizure of the property is a sufficient notice to the tenant that the lien is to be enforced according to the contract. The warrant is process of law with reference to this contract.

But it is objected that the property is about to be condemned without a trial by a jury, and that the Constitution declares that "the right of trial by jury shall be secured to all and remain inviolate forever." That the *right* of trial by jury "shall remain inviolate," means that the right shall, in all cases in which it was enjoyed when the Constitution was adopted, remain unabridged by any act of legislation. *Flint R. S. Co. vs. Roberts*, 2 Fla., 102, 114. The clause does not confer upon every party in all classes of



---

---

Blanchard and Burrus v. Raines' Executrix—Opinion of Court.

---

---

**cases** a right of trial by jury. It does not extend the right **to cases** ordinarily cognizable in courts of equity, or for the **enforcement** of liens, or cases of distress for rent, where the **right** of trial by jury did not before exist.

An act of Assembly of Maryland incorporating the Bank of Columbia provided that when any person gave a note negotiable at the bank, and neglected to pay it for ten days after demand in writing, the president might write to the Clerk of the General Court, sending to him the note, with evidence of the demand, and order the clerk to issue a *fieri facias* or attachment by way of execution, on which the debt and costs might be levied by selling the property of the defendant, the amount due to be sworn to by the president of the bank before execution issued. In case the defendant disputed the whole or any part of the debt, on the return of the execution the court should order an issue to be tried, and make such order that justice might be speedily done. The case of the Bank of Columbia vs. Okeley, 4 Wheaton, 235, arose under this act, and in the opinion of the court, it is said: "Was this act void as the law of Maryland? If it was, it must have become so under the restrictions of the Constitution of the State or of the United States. What was the object of those restrictions? It could not have been to protect the citizen from his own acts, for it would then have operated as a restraint upon his rights. It must have been against the acts of others. But to constitute particular tribunals for the adjustment of controversies among them, to submit themselves to the exercise of summary remedies, or to temporary privation of rights of the deepest interest, are among the common incidents of life. Such are submissions to arbitration; such are stipulation bonds, forthcoming bonds, and contracts of service. And it was with a view to the voluntary acquiescence of the individual, nay, the solicited submission to the

---

 Blanchard and Burrus v. Raines' Executrix—Opinion of Court.
 

---

law of the contract, that this remedy was given. By making the note negotiable at the Bank of Columbia, the debtor chose his own jurisdiction; in consideration of the credit given him he voluntarily relinquished his claims to the ordinary administration of justice, and placed himself only in the situation of an hypothecator of goods, with power to sell on default, or a stipulator in the admiralty, whose voluntary submission to the jurisdiction of the court subjects him to personal coercion. \* \* \* And if the defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered him by the act, it is presumable that he cannot dispute the justice of the claim. That this view of the subject is giving full effect to the seventh amendment of the Constitution, is not only deducible from the general intent, but from the express wording of the article referred to. \* \* \*

With this explanation there is nothing left to this individual to complain of. What he has lost he has voluntarily relinquished, and the trial by jury is open to him, either to arrest the progress of the law in the first instance, or to obtain redress for oppression, if the power of the bank has been abused." The execution was sustained.

The provisions of the charter of the Bank of Columbia and the circumstances of that case were so like the law and facts of the present, it would seem that the foregoing opinion is decisive of the present question. The act relating to the remedy by distress for rent and supplies gives the tenant the right of trial by jury if he chooses to avail himself of it by complying with the prescribed method.

"We cannot think the trial by jury substantially defeated by these conditions, though the defendant may, and at times probably will, be subjected to some inconvenience in complying. These terms may be onerous, but this is purely a question of expediency, and one which must from its very

---

---

**Mills et ux. v. Joiner—Syllabus.**

---

---

**nature** address itself exclusively to the law maker. And it is difficult to prescribe limits to the power of the Legislature in this respect. There is no invasion or infringement of the Constitution, so long as trial by jury is not directly or indirectly abolished." 5 Ga., 194; Vanzant vs. Waddell, 2 Yerger, 260; Donald vs. Schell, 6 S. & R., 240.

The forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to the legislative will.

4 Wheaton, 235, 443, before cited.

We must hold, therefore, that the provisions of the acts relating to distraining for rent and advances are not in conflict with the Constitution, and that the proceedings of the appellants in this case appear to be conformable to law.

The judgment dismissing the warrant and proceedings is reversed, and the cause remanded with directions to proceed therein according to the statute controlling the subject.

---

**GEO. B. MILLS ET UX., APPELLANTS, VS. LAWRENCE JOINER,  
APPELLEE.**

1. It is error to receive in evidence the statement of a party made in his own behalf to a third person, without in any way connecting the other party therewith, as it furnishes no legal proof of the facts claimed to exist, by reason of such evidence. Especially is it error when such evidence has a tendency to mislead the minds of the jury in coming to a correct conclusion.
2. It is a well established principle that hearsay evidence "is held incompetent to establish any specific fact, which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge."

---

Mills et ux. v. Joiner—Argument of Counsel.

---

3. It is presumption of law, that the father is not bound to pay a child, though of full age, for services while living with him at home, and as one of the family, but this presumption may be overcome by proof of a special contract, or an express or implied promise or understanding; and such implied promise or understanding may be inferred from the facts and circumstances shown in the evidence.
4. The plaintiff, a female of full age, agreed to work for her father, as she testifies, during his life, or until she was discharged; that the father agreed to convey her a certain piece of land as compensation for her services. The agreement was not in writing; she so worked for her father for twelve years; he then discharged her and conveyed the land to a third person. She brings an action at law for her services. The court instructed the jury in substance that the plaintiff could only recover the land, or the value of it, and if there was no evidence of the value of the land, the verdict should be for the defendant: *Held*, to be error. The agreement not being in writing, and being for the conveyance of land, she could not maintain an action for specific performance, but could upon a *quantum meruit*.

Appeal from the Circuit Court for Gadsden county.

The facts of the case are stated in the opinion.

*John W. Malone* for Appellants.

The first error assigned involves a consideration of the testimony of Wm. H. Scott, who testified in substance as follows: I know the plaintiffs and defendant in this suit; I have been engaged in merchandizing for a number of years. The defendant has on several occasions purchased of me dry goods and paid for them. On several occasions the defendant has requested me to select a dress for him, saying, "that he wanted it for his daughter, Mrs. Mills, and I did so. I think the defendant would purchase of me as much as \$35 or \$50 worth of goods a year, but this is guess work on my part." The testimony was inadmissible because it was irrelevant to the issue joined, and because it was re-

---

---

Mills et ux. v. Joiner—Argument of Counsel.

---

---

giving an *ex-parte* statement made by the defendant to the witness as evidence for the defendant. 1 Greenleaf's Ev., 13th Ed., 50 and 171.

Yet it was of a nature well adapted to make an impression on the minds of the jury beneficial to the defendant and prejudicial to the plaintiff's case. The admission of testimony of such a nature affords a good ground for setting aside a verdict. 10 John. Rep. 128; 13 Ibid, 350; 15 Ibid, 239; 16 Ibid, 89; 3 Cowen, 612; 8 Barb., 630; 17 Texas, 558; 16 Fla., 76; 4 Adolp. & Ellis, 53; 7 Ibid, 313; 3 Nev. & Man., 132; 1 Stroble, 135; 10 B. Mon., 316; 10 New Hamp., 269; 3 Little, 77.

The second error assigned involves a consideration of all the evidence in the case as well as a portion of the Judge's charge.

We submit that the manifest weight of the evidence is so much against the verdict as to bring this case within the rule laid down by this court in the case of Wilson vs. Biddle, 14 Fla., 47.

The charge of the court, or such parts thereof as was excepted to, will now be examined and discussed in their order.

The first exception was to so much of the charge as reads as follows: "But when a daughter remains with her father and renders services to him without a special contract or express promise that she is to be paid for them, then the law presumes that such services were rendered from motives of filial affection, and gives the daughter under such circumstances no right to recover for such services."

This instruction was evidently too limited, and not applicable to the case at bar. It confined the jury in their inquiry to a special contract or express promise and precluded them from inquiring into and considering such circumstances connected with their dealings together as

---

Mills et ux. v. Joiner—Argument of Counsel.

---

would fairly warrant the inference that it was the understanding and expectation of the parties on both sides, that the services were to be paid for. The jury were virtually told in the above instructions that a special contract or express promise must be proven, otherwise the plaintiffs could under no circumstances recover; that a contract could not be presumed from the circumstances of the plaintiffs' and defendant's dealings together; and that in the absence of a special contract or express promise, they must presume that the services were rendered from motives of filial affection. This instruction does not accord with the established rule applicable to the dealings between parent and child. 33 New Hamp., 581; 37 Ibid, 133; 6 Indiana, 60; 16 Illinois, 296; 5 Wisconsin, 472.

The circumstances connected with the dealings together between the plaintiffs and defendant, we think, fairly warrant the inference that it was the understanding and expectation of the parties on both sides, that Mrs. Mills was to be paid for her services by the defendant.

The second exception was to so much of the charge as read as follows: "If you believe from the evidence that even if the daughter had served her father all his life, she would in that event have had a right to recover only the value of the land, or the land itself, then the plaintiffs cannot recover in this action more than the value of the land. What the value of the land is may be a question for you to determine from the evidence if you find that there is any evidence on that subject. If you find that there is no evidence as to the value of the land your verdict should be for the defendant."

The plaintiffs could not enforce a specific performance of their contract with the defendant and compel a conveyance of the land because the contract was verbal only and in contravention of the statute of frauds, nor could they sue

---

---

Mills et ux. v. Joiner—Argument of Counsel.

---

---

upon the special contract and recover the value of the land, for the same reason. 19 Fla., 366.

The cases in which a person can recover the value of the land for a refusal to convey the same in pursuance of an agreement to do so, are those where there is a valid and legal agreement to convey, and the defendant in the breach of said agreement is guilty of some fraud.

The case at bar is not one of these cases. The express contract proven by the plaintiffs was verbal and in contravention of the statute of frauds; hence they must recover on the common counts the value of the services rendered. 21 Eng. Com. Law. Rep., 479; 5 Wendell, 204; 19 Fla., 365; *In re Dickenson Estate*, S. C. Mich., January, 1883; 14 N. W. R., 691.

The above instructions we insist were erroneous and amounted to such a misdirection as was calculated to mislead the jury. Under such circumstances the court will grant a new trial although there may be sufficient evidence to sustain the verdict. 3 Wendell, 419; 5 Mass., 365 and 438; 5 Barn. & Cress., 501.

*E. C. Love and P. B. Stockton* for Appellees.

The first exception taken by the plaintiffs was as to the admissibility of the testimony of W. H. Scott, a witness for the defendant. The defendant insists that the testimony of said Scott was relevant and legal, rebutting as it does the idea that any express contract existed between the defendant and Mrs. Mills, and corroborating the testimony of the defendant who swore that no contract for hire or compensation for services of his said daughter ever existed between them, and indicating that so far from defendant treating his daughter as a hired servant or employee, he regarded her as his daughter and was maintain-

---

Mills et ux. v. Joiner—Argument of Counsel.

---

ing her as such. If the testimony was immaterial and not calculated to mislead the minds of the jury in arriving at a correct conclusion, the court will not reverse the judgment for the reason that it was admitted. See *Nickels Gautier vs. Mooring*, 16 Fla., 76; *Simpson & Co. vs. Daniels*, 16 Fla., 677.

The second error complained of by plaintiffs is the refusal of the Circuit Court to grant a new trial of the case. The first ground mentioned in the motion for a new trial is:

I. That the verdict is manifestly against the weight of evidence, and

II. That the verdict is not supported by the evidence.

We insist that both these grounds were properly overruled, for the reason that the testimony of Lawrence Joiner, the defendant, fully sustains and authorizes the verdict.

In all cases of conflict of testimony the jury is the sole judge of the credibility of witnesses and have the right to reject what they do not believe. A verdict will not be set aside as against the weight of evidence when such evidence seems to preponderate against their finding. *McMurray & Brittain vs. Bassnet*, 17 Fla., 609; *Nickels & Gautier vs. Mooring*, 16 Fla., 76; *John D. C. vs. The State ex rel.*, 16 Fla., 554; *Wilson & Wilson vs. Dibble*, 14 Fla., 47; *Sherman vs. The State*, 17 Fla., 888.

A verdict is not against evidence where there is legal evidence to support it, though there be a conflict on a material point. *Huling vs. Fla. Savings Bank*, 19 Fla., 695.

The third ground mentioned in the motion for a new trial is the charge of the court to the jury in reference to the services of an adult child living with a parent without a special contract or express promise to compensate the child for services performed. We insist that this ground was



---

---

Mills et ux. v. Joiner—Argument of Counsel.

---

---

properly overruled and that the charge of the court was correct, embodying the law in such cases. See *Andrews vs. Foster*, 17 Vermont, 556; *Fitch vs. Peckham*, 16 Vermont, 150.

Where a daughter continues to reside in her father's family after her age of majority the same as before, the law implies no obligation on the part of the father to pay for the services. *Andrews vs. Foster*, 17 Vermont, 556. Also see *Fitch vs. Peckham*, 16 Vermont, 150.

The doctrine contained in above cases is still further illustrated in the case of *Daubenspect Ex'r vs. Powers*, 32 Ind., p. 42.

If it is shown that the services were rendered voluntarily no payment for them can be recovered, however great the benefit conferred, nor will the hope of a bequest or gift from the party served change this result, or should the parties be father or son or near relatives the presumption of a contract to pay for the services on the one hand and for board on the other will not ordinarily arise. See *Bishop on Contracts*, p. 77, and cases cited.

The 4th ground of motion for a new trial is an exception to the charges of the court in relation to the measure of damages. We insist that this ground was properly overruled and that the charge of the court is substantially correct. Mrs. Mills, the plaintiff, does not testify as to any specific amount her father was to pay for her services, but that her father was to fully compensate her for her services by giving her a certain designated piece of land. That was to be the measure of compensation, the stipulated reward for all her services, whether it was little or much, and she must fix the value of her services by proving the value of the land. There can be no other just measure by which her services can be computed, for it is evident from her testimony that she did not render her alleged services for any

---

Mills et ux. v. Joiner—Argument of Counsel.

---

stipulated sum of money, for according to her own testimony her father's pecuniary circumstances were not such as to justify him in paying or her in the expectation of receiving a pecuniary compensation for any services she might perform. To compute the value of her services at the rate of \$5 per month for a period of 13 years might do great injustice to the defendant and give to the plaintiffs a remuneration for services far in excess of that fixed by the contract or agreement. The value of the land should have been proven at the trial as a guide to the jury in fixing the value of her services and in arriving at the amount of damages she sustained by reason of the failure of the defendant to comply with his alleged promise in case the jury found for the plaintiffs.

There is no evidence in this case that the defendant acted or intended to act in bad faith, but the fact that the plaintiffs had the use of defendant's land and premises free of rent and neglected and refused to furnish the defendant in his old age with the necessities of life, forced him, the defendant, to sell the land and thereby place himself in a condition not to be able to allow his will to stand as he made it in 1878. Sedgwick on Meas. Dams., pp. 216, 224, 225 and 239; Hopkins vs. Lee, 6 Wheat., 109, 118; Jewet vs. The Lawrenceburg R. R. Co., 10 Ind., 539; Devin vs. Himer, 29 Iowa, 297.

It is evident in this case that the jury did not believe from the testimony that there was any special contract or special promise to pay for plaintiff's services. In the matter of an erroneous charge where the verdict accords with the law and facts, see Mays' Ex'rs & Ex'x vs. Seymour, 17 Fla., p. 725.

As to the 5th ground in motion for new trial, "That said verdict is contrary to the law of the case," we insist

---

**Mills et ux. v. Joiner—Opinion of Court.**

---

at said ground was, in view of the authorities heretofore  
ed, properly overruled.

The defendant insists that in this case, the plaintiff be-  
g the daughter of the defendant, where no contract or  
ligation to pay for services is presumed, the plaintiff  
ould set out in his declaration a special contract or express  
omise, and where he neglects to declare on a special con-  
ct he cannot recover on a common count, there being  
thing presumed in her favor, and if the special contract  
void under the statute of frauds then the plaintiff can-  
t recover at all.

**MR. JUSTICE VANVALKENBURGH** delivered the opinion of  
e court:

The plaintiffs, Henrietta Mills and George B. Mills, her  
sband, brought their action in Gadsden County Circuit  
urt against Lawrence Joiner, who was the father of  
enrietta Mills, claiming to recover the sum of fifteen hun-  
ed dollars for the price and value of work done by said  
enrietta for the defendant, at his request. The defendant  
nied the indebtedness, and issue was duly joined. The  
ue thus joined was tried at a term of the Circuit Court  
ld in Gadsden county in November, A. D. 1883, and the  
ry found for the defendant, whereupon a judgment was  
tered against the plaintiffs. The plaintiffs moved for a  
w trial for the reasons as follows:

1. The verdict is against the weight of evidence.
2. The verdict is not supported by the evidence.
3. The court instructed the jury as follows: "But when  
daughter remains with her father and renders services to  
m without a special contract or express promise that she  
to be paid for them, the law presumes that such services  
re rendered from motives of filial affection, and gives the

---

---

Mills et ux. v. Joiner—Opinion of Court.

---

---

daughter, under such circumstances, no right to recover for such services.” Which charge was excepted to by plaintiffs’ attorney.

4. The court further instructed the jury: “If you believe from the evidence, that even if the daughter had served her father all his life she would in that event have had a right to recover only the value of the land, or the land itself, then the plaintiffs cannot recover in this action more than the value of the land. What the value of the land is may be a question for you to determine from the evidence, if you find that there is any evidence on that subject. If you find that there is no evidence as to the value of the land, your verdict should be for the defendant,” which charge was excepted to by plaintiffs’ attorney.

5. That the verdict is contrary to the law of the case.

The motion for new trial was denied, and the plaintiffs bring their appeal.

The errors here assigned are:

First. The admission of the evidence of Wm. H. Scott in behalf of the defendant.

Second. The overruling of the plaintiffs’ motion for a new trial, and the refusal to grant the same.

The evidence on the part of plaintiffs showed that Henrietta Mills was the daughter of the defendant, Joiner. That in January, 1870, she, then being over twenty-one years of age and unmarried, told her father and mother that she intended leaving them and seeking employment elsewhere. That her mother was then in bad health and her father very poor, and burdened with debt. That both her father and mother requested her to remain at home, and her father promised to pay her for her services if she would remain and take care of and wait on him and her mother. That in consideration of such promise of payment, she did remain and attend to the household mat-

---

---

Mills et ux. v. Joiner—Opinion of Court.

---

---

ters. She so remained for twelve years. No price was mentioned to be paid for her services. The mother died in 1873. That soon thereafter her father told her if she would continue to serve him as before during his lifetime, or until he should sooner discharge her, he would give her in payment for her services a piece of land containing about one hundred acres, pointing out to her the boundaries of such land. There was no written agreement, but only a verbal one. During the period of her services she did the cooking and washing for the family; all of the house work, attended to the dairy and poultry; milked and took care of the cows, wove cloth and made the clothing for the family; she made most enough from the dairy and poultry to supply the family, and the money realized from the crops was used by the defendant in paying off his debts. In 1878 she told defendant she wished to marry Mr. Mills. He did not object, but said she must continue to reside with and serve him just as she had previously done, otherwise she would forfeit the contract. She married Mills in October, 1878, but continued to reside with and serve her father just as she had previously done. They all lived very happily together until January, 1883, when defendant dismissed her, and told her he had conveyed the land to her brother and his son to prevent her from getting anything for her services. She is now poor, an invalid, with no home and no place to shelter her if compelled to leave her present place of residence, which is on the land. Her services were worth at least five dollars per month.

The brother of Mrs. Mills testified that it was understood in defendant's family that he was to give the one hundred acres to Mrs. Mills, in payment for her services. That in 1879 defendant told him so himself. That Mrs. Mills, since 1870, had done the cooking, washing, all the house work, attended to the dairy and poultry, milked the

---

---

Mills et ux. v. Joiner—Opinion of Court.

---

---

cows, wove cloth and made the clothes for the family. The defendant testified that he never made any contract or agreement with Mrs. Mills to compensate her for her services. That he never agreed to give her in payment for her services the piece of land designated; says he told her he had made his will in 1878, and in that he gave her the land. He never regarded her as a hired servant, and always treated her as a daughter. That he was compelled to sell the land to get a support for himself. That he sold it to his son Thomas Joiner. After he sold the land he destroyed the will. He could not get along with Mills. He told him to leave the place last January, but did not order his daughter away. Has not permitted his daughter to serve him since he told Mills he must leave.

The defendant then offered Wm. H. Scott as a witness who testified as follows: "I know the plaintiffs and defendant in this suit. I have been engaged in merchandising for a number of years. The defendant has on several occasions purchased of me dry goods, and paid for them. On several occasions the defendant has requested me to select a dress for him, saying that he wanted it for his daughter, Mrs. Mills, and I did so. I think the defendant would purchase of me as much as thirty-five or fifty dollars worth of goods a year, but this is guess work on my part."

The evidence of Scott was objected to by attorney for plaintiffs; the objection was overruled by the court, and this is the ground of the first assigned error.

The counsel for the appellee in this case, (defendant below,) in his argument says that the testimony "was relevant and legal, rebutting as it does the idea that any express contract existed between the defendant and Mr. Mills, and corroborating the testimony of the defendant, who swore that no contract for hire or compensation

---

*Mills et ux. v. Joiner—Opinion of Court.*

---

for services of his said daughter ever existed between them, and indicating that so far from defendant's treating his said daughter as a hired servant or employee, he regarded her as his daughter, and was maintaining her as such." The defendant was a house-keeper, Scott was a merchant, the defendant purchased of Scott from thirty-five to fifty dollars worth of goods a year, as Scott guesses. This evidently is not a large sum for a family during a year. How large the family was, does not appear, but there were at least two persons in it after the mother's death in 1873. During the twelve years of service of Mrs. Mills, Scott testifies that on several occasions the defendant requested him "to select a dress for him, saying he wanted it for his daughter, Mrs. Mills, and I did so." Mrs. Mills does not appear to have been present on any of these occasions. If she had been, she probably would have made her own selection. It was only the declaration of the defendant, made to Scott, that he wanted a dress for his daughter. Scott says defendant paid for the goods purchased of him. Mrs. Mills, in her evidence says: "During the period I served father for compensation, he occasionally purchased a few things for me, but always with my own money." This declaration to Scott was not proper evidence to go to the jury; it was irrelevant and hearsay evidence. It was receiving the statements of the defendant as evidence for himself, without in any way connecting the plaintiff therewith. It furnishes no proof of the fact claimed to exist, that the defendant provided any dresses or other goods for Mrs. Mills, or that he was providing for her as a daughter, outside of the agreement to pay her for her services, which she insists upon. We cannot see that it in any way rebutted the idea that an express contract for hire existed between the defendant and Mrs. Mills, or in any legal manner corroborated the testimony of defendant. It

---

Mills et ux. v. Joiner—Opinion of Court.

---

had a tendency to mislead the minds of the jury in coming to a correct conclusion, and therefore should not have been admitted.

Hearsay evidence "is uniformly held incompetent to establish any *specific fact*, which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge." 1 Greenleaf Ev., 13th Ed., §99.

The second error assigned is "the overruling of plaintiff's motion for a new trial, and the refusal to grant the same."

Those portions of the charge of the court as contained in the third and fourth above cited grounds for a new trial were duly excepted to by counsel for the appellants, and we shall only notice those in examining this case.

In the trial of this cause the court charged as is alleged in the third assigned ground for a new trial, that the daughter could not recover without proving "a *special contract or express promise* that she was to be paid for her services." The daughter was more than twenty-one years of age when the services for her father commenced, and she was unmarried. Her evidence is to the effect that her father promised to pay her for her services. The father testified that he made no such promise. The law raises no presumption of a promise to enable a child to maintain an action against the father to recover compensation; but the reverse may be established by proof of either an express or *implied contract*. An implied contract being proven by facts and circumstance which show that both parties at the time the services were performed contemplated or intended pecuniary recompense. It is competent in such case for a jury to infer a promise by the father from the surrounding circumstances. It is a presumption of law that the father is not bound to pay a child, though of full age for services while living with him at home and as one of the family; but this presumption may be overcome



---

---

Mills et ux. v. Joiner—Opinion of Court.

---

---

proof of a special contract, express promise, or an implied promise; and such implied promise or understanding may be inferred from the facts and circumstances shown in evidence. The jury should have been further instructed that if under all the circumstances of the case, the services were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that compensation should be made for such services, then the jury should find an implied promise. The charge was incorrect, in that it confined them to finding a "special contract or express promise." *Guild vs. Guild*, 15 Pick., 129; *Hart vs. Hart*, 41 Mo., 441; *Freeman vs. Freeman*, 65 Ill., 106; *Hilbish vs. Hilbish*, 71 Ind., 27; *Putnam vs. Town*, 34 Vt., 429; *Schouler's Dom. Rel.*, §269, and cases cited; 3 *Wait's Actions & Defences*, 584, and cases cited.

The other portions of the charge of the court to the jury, which was excepted, in effect, that the plaintiffs could only recover the land, or the value of it; and that if there was no evidence of the value of the land, then the verdict should be for the defendant, we think equally incorrect.

Mrs. Mills, according to her evidence in January, 1870, agreed with her father to work for him in the lifetime of her mother, he promising to pay her for her services. The mother died in 1873. No price had been arranged for such work. She worked under such promise during these years. After the mother's death the defendant made another bargain with the daughter, by which he, in the consideration of her agreeing to live with him and serve him as she had been doing during the mother's life, until his death, or sooner discharged, promised to give her in payment a certain piece of land in Gadsden county. There was no written agreement. The defendant denies in his evidence this contract or any agreement. He did insert in his will a devise of this land to his daughter, but subsequently de-

---

---

Mills et ux. v. Joiner—Opinion of Court.

---

---

stroyed the will, and conveyed the land to another person. John Joiner, a son of the defendant, testified that in 1873 the defendant told him that he had agreed to give Mrs. Mills the land in compensation for the services she had rendered to him. There is no proof of the value of this land. The contract in this case was in contravention of the statute of frauds. The conveyance of the land was the consideration of the promise of service, and that service was continued from the death of the mother in 1873 to the commencement of this action in 1880. No action could be brought upon the contract for want of a written agreement or promise, or some note or memorandum thereof, in writing, signed by the party to be charged, or by some other person by him thereunto lawfully authorized. *McClellan Dig.*, 208.

The defendant has, by his own action, disabled himself from conveying the land to Mrs. Mills, by deeding it to another person, and therefore forfeits his contract. The contract has been fully executed by the plaintiff. She remains at service until she is discharged by the defendant. She cannot compel a specific performance by her bill in equity, but she has a plain remedy in a court of law for the value of her services, as she may prove them, and is not confined to the value of the land.

“If there be a contract, void for want of writing under the statute of frauds, from the part performance of which by the plaintiff the defendant derives a benefit, he is often liable, not upon the agreement, but upon a *quantum meruit* to the extent of the benefit received.” Inasmuch as the court instructed the jury in this case that the plaintiff could “recover only the value of the land or the land itself,” and that if there was no evidence of the value of the land, the verdict must be for the defendant, there was error. *Shute vs. Dorr*, 5 Wend., 204; *King vs. Welcome*, 5 Gray

---

---

Simmons et al. v. Spratt—Syllabus.

---

---

41; Kidder vs. Hunt, 1 Pick., 328; 1 Chitty on Contracts, 11th Ed., 81, and cases cited.

The judgment is reversed and a new trial granted.

---

**ELIZA SIMMONS ET AL., APPELLANTS, VS. LEONIDAS W. SPRATT, APPELLEE.**

1. The general rule is that if a deed purport to have been executed under a power, either of a public or private character, or by the officer of a court under a decree, and it is sought to use the deed in evidence, the power should be shown, and in case of deed under a decree the party offering the deed should introduce a transcript of the record of the decree.
2. Where, however, such deeds purporting to be executed by executors under the powers of a will and orders of the probate court, and by a master in chancery under a decree in chancery are offered and placed in evidence without objection in the Circuit court, it is too late to object in the Appellate Court that neither the will, the order, nor the decree authorizing the sale or the disposition made by the deed was introduced.
3. Independent of the statute (McC. Dig., 515) prescribing how official papers or certified copies thereof may be used in evidence, the rule is that every document of a public nature, which there would be an inconvenience in removing and which the party has a right to inspect, may be proved by a duly authenticated copy. The official character of the record, however, must be shown. Where a paper is proposed to be introduced as a copy of a public survey by a public officer authorized to make it, it is necessary to show something more than that such a survey, purporting to have been made by a person not shown or purporting to be a public officer, was simply copied from the original found in a public office.
4. Where the courses and distances in a deed do not cover the quantity of land called for and are therefore uncertain as boundaries, and there are other boundaries given in the deed by adjoining tracts

---

 Simmons et al. v. Spratt—Opinion of Court.
 

---

which are ascertained and sufficiently established, the lines ~~will~~ be extended to them where such a course is consistent with ~~the~~ manifest intention of the parties. *Hogans vs. Carruth*, 19 ~~F~~ *La.*, 84, cited and followed.

5. An adverse possession of land under claim of title of less than ~~se~~ *seven* years does not bar the right of action of the true owner or ~~his~~ grantees. Where the defendant in ejectment is in actual pos~~ses~~ sion the plaintiff cannot recover where he fails to show legal ti-  
tle in himself or that he was a prior actual occupant ousted ~~by~~  
the defendant.
6. If the intended grantee in a deed is not named he should be ~~ascer~~ *ascertained* by description so as to be distinguished from all ~~other~~ *others*. A deed which sets apart, distributes and conveys "a lot of ~~land~~ *land* to the estate of Daniel W. Hart," Daniel W. Hart being ~~dead~~ *deceased*, does not pass the legal title to his niece, his devisee under ~~his~~ will entitled to his estate, and a purchaser of the interest of ~~the~~ *the* devisee of Daniel W. Hart in such lot acquires no legal title.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

*Geo. Wheaton Deans* for Appellants.

*A. W. Cockrell* for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of ~~the~~ court.

This is an action of ejectment by Spratt against Eliza ~~and~~ William Simmons to recover possession of and to establish his title to lot 2, block 134, in the City of Jacksonville, ~~ac~~ *ac*cording to "Hart's map of said city."

After trial and verdict for plaintiff, and after motion ~~to~~ set aside the verdict and for a new trial by defendants ~~over~~ ruled, there was judgment that the plaintiff "recover an ~~es~~ *es*tate in fee of" the lot. From this judgment defendan~~ts~~ *ts* appeal upon exceptions taken during the trial, and to ~~t~~ *the* action of the court in overruling the motion to set aside ~~t~~ *the*

---

---

Simmons et al. v. Spratt—Opinion of Court.

---

---

verdict, and for a new trial. To the various deeds, to the will of Daniel W. Hart, and to the deed of Judson W. Whitney, Special Master in Chancery, introduced in evidence by the plaintiff during the trial, no objection was made. As to these papers the bill of exceptions recites that the plaintiff produced and proved, severally, the due execution of the original deeds; that he offered and put the same in evidence, and that no objection was offered thereto.

The first point to which our attention is called, in appellants' brief, is that the deed of the lot from Judson W. Whitney to plaintiff purporting to be his deed as a special master under a decree of a court of chancery fails to show any title in plaintiff because "neither the decree referred to, if there ever was one, nor any copy of any such decree was produced and offered in evidence at the trial, and none appears in the record of the proceedings filed in this court."

The general rule upon this subject is, that if a deed purports to have been executed under a power either of a private or public character, or by the officer of a court under a decree and it is sought to use the deed in evidence, the power must be shown, or in case of a decree the party offering the deed must show the proceedings upon which the decree authorizing the deed was founded. 1 Greenleaf on Ev., 511; Emerson vs. Ross, 17 Fla., 125. The practice, however, in this State is that if such deed is admitted in evidence without objection by the defendant in the Circuit Court, the party cannot, upon appeal, raise the objection here for the first time. Under such circumstances the question here presented is, whether admitting the deed to be duly executed under a legal decree and in conformity with the will the verdict was contrary to the evidence unless there be ground of exception and reversal

---

---

Simmons et al. v. Spratt—Opinion of Court.

---

---

other than those arising out of the deed. *Emerson vs. Ross* 17 Fla., 125.

The objection made here for the first time, that the deed of the executors of I. D. Hart purporting to convey and distribute the estate of I. D. Hart under an order of the Probate Court and in accordance with the will of the testator was inadmissible, is of the same character as that just disposed of. The defendant here could have insisted upon the production of the proceedings in the Probate Court and of the will had he seen proper so to do upon the trial but having failed to do so in the Circuit Court at the trial when the defect might have been remedied he will not be permitted to profit by his own neglect in this respect thereupon his appeal here where the defect cannot be supplied. We do not mean to say that the recitals in this deed are binding upon those who claim by title paramount to it or against it, but simply that proof of the decree, order and will is waived by not insisting upon it.

The next objection of the defendants to the action in the Circuit Court, which we are asked to review here, is refusal of the court to permit a certified copy of the field notes by David H. Burr of the survey of the claim of Z. Hogans, referred to by several of the witnesses, to be put in evidence. To this action the defendant excepted.

M. Martin, signing as Surveyor-General of the United States for the State of Florida, certified that "the foregoing field notes and plat of the claim of Z. Hogans in township 2, south of range 26, east, have been carefully copied from the originals on file in this office."

Plaintiff insists that no provision is made in the statutes of this State for the admission of this paper in evidence. It is true that none of the statutes of this State contain provision making this paper evidence. This, however, does not settle the question, as the plaintiff here seems -

---

---

Simmons et al. v. Spratt—Opinion of Court.

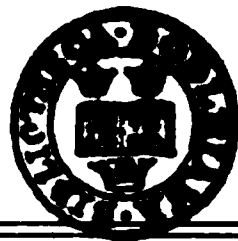
---

---

think as he confines his argument to that point. Independent of this statute the rule is "that every document of a public nature, which there would be an inconvenience in removing and which the party has a right to inspect, may be proved by a duly authenticated copy." This is the rule announced by some of the text writers on evidence. 1 Greenleaf on Ev., §484; Gresly on Ev., §115.

The statute does not propose to abolish or change the rule. The official character of the record must be shown however. In the present case there is no evidence that the party making this survey was an officer of any kind. The certificate of the Surveyor-General simply states that the field notes and plat have been carefully copied from the originals filed in his office, and the simple filing of a private survey in a public office does not make it evidence of the facts it recites or of the acts purporting to have been done. There is no evidence here that Burr was authorized or required to make this survey in discharge of a public duty under oath; (*Ellicott vs. Pearl*, 1 McLean, 212; s. c., 10 Pet., 188;) or in any other capacity which would make a certified copy of it evidence. Again, it is to be remarked that the certificate of the Surveyor-General is not that the paper is a true copy of the original. The certificate should be that the paper is a true and correct copy of the original on file in his office, and not that it has been "carefully copied from the original on file" in his office. Whether this in itself would be a fatal objection we do not say. We simply call attention to the want of conformity to the strict rule upon the subject. There may be other objections to this paper, but those above stated, not including the nature of the certificate, were certainly sufficient to justify its exclusion when its admission in evidence was objected to.

The next question which arises upon exceptions by the defendant and appellant is whether the court erred in refus-



---

**Simmons et al. v. Spratt—Opinion of Court.**

---

ing to set aside the verdict and grant a new trial upon ground that the finding of the jury was contrary to law and evidence. This involves a general review of evidence and the case.

Plaintiff claims his title through I. D. Hart, and his title is derived from the owners of the Hogan's Grant and Donation, as they are shown to exist in the opinion rendered in the case of *Hogans vs. Carruth*, 19 Fla., 9. So far as the question of Hart's title is concerned he there are no questions of law involved in its consideration and the questions arising upon the evidence are simply to the credibility of witnesses. From the evidence plaintiff's witnesses the jury under the law of boundaries as fixed by the case of *Hogans vs. Carruth*, 19 Fla., 84, has a right to conclude that the Hogans Grant and the Hogan Donation were coterminus, and that lot 2, block 134, was embraced in the tracts of land entered upon by I. D. Hart and embraced in the deeds of conveyance held by him. I. D. Hart, or those claiming under him, had constructive possession of this land from 1834 to 1836, for at least thirty-eight years. The title under which defendant's possession is attempted to be upheld proceeds from C. F. Smith, with no apparent right from any source, so far as this record discloses, on the 10th of January, 1874, presumed to make a deed of this lot to C. L. Robinson. C. L. Robinson and wife, on the 31st of March, 1876, conveyed the lot to William L. Seymour, Robinson's brother-in-law. He, Robinson, as the agent of his brother-in-law, then leased it to Lindsey for three years, after which Robinson rented it to Brown. Brown died and his wife married Simmons, the defendant, who with his wife was in possession at the institution of this suit.

The evidence as to the actual possession of this lot, is as follows: C. L. Robinson testifies that he had a fence p



---

---

Simmons et al. v. Spratt—Opinion of Court.

---

---

around the lot in 1874, as the agent of C. F. Smith. How long this fence remained is not disclosed. After stating the sale to Seymour, (which was in 1876,) Robinson says that he fenced the lot in, and that "the fence remained for a long time, until it was picked away by the neighbors for fuel;" that he then leased it to Lindsey for three years and he removed the fence. As to when Brown, who leased the land after the expiration of the lease to Lindsey, went into possession he does not state. All that he says is that after Brown died and his wife married Simmons the defendants occupied the lot.

William Caulk testified that immediately after the deed of distribution was given, (June 1, 1866,) he took the lot in charge, paid taxes on it, and controlled the lot in 1877; that he set posts on lots one and two, in block 134; that no one was in possession then; that sometime thereafter he saw a house going up on it by a colored men; that he inquired what he was doing, and he said that Mr. Robinson told him to improve it. He states further that the colored man consented to hold under him. This witness says: "I have been in possession of the lot in controversy, and indeed of block 134. The corner post I put there is there yet, or was there the last I saw of it. I went in possession for Lulu Dearing by reason of a division of land of I. D. Hart of a document I hold in my hand. Lulu Dearing was the niece of D. W. Hart, and he made her his heir and devisee in his will. D. W. Hart was the son of I. D. Hart and his heir, and this particular lot fell to the share of Lulu Dearing in distribution and many other lots, and I held it in possession until the foreclosure of the mortgage executed by Lulu Dearing and her husband."

The sale under the mortgage was on the 6th of January, A. D. 1879. This action was instituted in A. D. 1883. This is a period of four years.

---

---

Simmons et al. v. Spratt—Opinion of Court.

---

---

There are other witnesses whose testimony conflicts with these statements of Caulk, but as we have had occasion to say before in this opinion, and to decide in many other cases, it is within the province of the jury to believe Caulk's statements rather than the testimony of the other witnesses.

Independent of the question as to what constitutes "claim of title exclusive of any other right," or a claim of "title founded upon a written instrument" under our statute of limitations (Chap. 1869, Laws), there is no possession here, adverse or otherwise, for such a period as is necessary to bar the right of action of those in whom the legal title is vested. That period is seven years. No more than four years can be claimed under this testimony. The defendants here have no more than the right which results from simple actual present possession of the lot.

We have seen that the title to this lot is shown to have been in I. D. Hart.

Spratt, the plaintiff, claims that he has this title. As proof of it he places in evidence what is called a deed of distribution by I. D. Hart's executors, under which he claims that Daniel W. Hart, a son of I. D. Hart, acquired this lot, the will of Daniel W. Hart under which he claims the title passed to Lulu J. M. Dearing, Hart's niece, and the deed of Judson W. Whitney, Special Master in Chancery, under which he claims that he acquired the interest and title of Lulu J. M. Dearing. Spratt neglects here to put in evidence the will of I. D. Hart and the proceedings in the Probate Court authorizing the distribution of his property and also the proceedings in the suit against Lulu J. M. Dearing, which was a suit to foreclose a mortgage of Lulu J. M. Dearing upon said lot.

The deed of the executors of I. D. Hart is dated June 1,

1866. The executors by it “sets apart, distributes and conveys *unto the estate of Daniel W. Hart*” this lot.

It appears from the testimony of Caulk that Lulu Dearing was the niece of Daniel W. Hart, a son of Isaiah D. Hart. Under the will of D. W. Hart she was entitled to all of his property except a gold-headed cane. It further appears from the deed of the master to Spratt, and the testimony of Caulk, that the land embraced in this suit was embraced in the mortgage “executed by Lulu Dearing and her husband,” and sold to Spratt under the foreclosure proceedings. The remaining question, therefore, as to title shown is whether plaintiff proved title in Daniel W. Hart, because, if so, the testimony of Caulk, to which there was no objection, must be held to identify the land in question as being devised by Daniel W. Hart to Lulu Dearing, whose interest passed to Spratt under the sale. The question, therefore, is whether Daniel W. Hart or his devisee took such an estate under what is here called the deed of distribution of the executors of I. D. Hart as can sustain an action of ejectment.

The deed of the executors which covers this lot of land is dated June 1, 1866. The executors by the deed “sets apart, distributes and conveys unto the estate of Daniel W. Hart” the lot in controversy. It is recited in the deed that the executors had been authorized by the Judge of Probate to sell the vacant town lots in Jacksonville belonging to the estate for the purpose of paying the debts of the deceased and distributing “the estate more equally among the legatees,” a sale after due advertisement, of sixty-five lots to persons other than legatees, and that the rest of the property was bid in by and for the legatees and by the executors for and in behalf of said estate; that the conditions of the sale had been complied with; that a final decree and order to said executors dated 18th January, 1866, was made

---

---

Simmons et al. v. Spratt—Opinion of Court.

---

---

to make distribution among the legatees and others entitled under the said will.”

The question is, does a deed of conveyance by the executors of I. D. Hart, who, under his will and an order of the court, are authorized to distribute I. D. Hart's estate, conveying and setting apart this lot to the estate of Daniel W. Hart, vest such title in the devisee of Daniel W. Hart who alone under the terms of his will could acquire it as would enable such devisee to maintain ejectment. It is insisted that these terms passed no estate; that the legal title here is still in the executors of I. D. Hart, if it was there before this deed. The description of the grantee as “the estate of Daniel W. Hart” in this deed of conveyance by the executors we think is too vague and uncertain to constitute a competent grantee at law.

The rule is: “If the intended grantee be not named, he should be ascertained by description so as to be distinguished from all others, and any uncertainty in this respect will render the grant void.” *Thomas vs. Mansfield*, 10 Pick., 366. Here there is no grantee by name or otherwise and no reference to the will of D. W. Hart is made. There are some cases which make such a deed effective to pass title to the administrator where he takes the title of the intestate, but we do not think this a parallel case.

The greatest extent to which the courts have gone in the matter of ascertaining the grantees in an uncertain deed is to permit extraneous evidence to be given to ascertain to whom such description is meant to apply when such evidence can explain the plain uncertainty, but at the same time accomplish a manifest intention. In the case of *Webb vs. Den.*, 17 How., 579, the deed was to “the legatees and devisees of the late Anthony Bledsoe.” This language necessarily restricted the grantees to such persons as took under the will. The court held that by this description

---

---

Simmons et al. v. Spratt—Opinion of Court.

---

---

the deed necessarily referred to the will to ascertain who were such devisees, that it thus far incorporated it, and that it contained therefore a sufficient description of the grantees. Here we are without the most remote reference to the will of Daniel W. Hart or anything by which it can be contended that his niece, Mrs. Dearing, was the grantee in the deed of the executotrs. Nor is the will of Isaiah D. Hart in evidence to identify his legatees or devisees. See the cases on this subject collected in Martindale, on the law of conveyancing, §§69, 70.

The grant here is to an estate, but what that means or what is intended is nowhere defined, and the executors connect nothing with their description by way of reference to enable identifying evidence to come in. We cannot say that the word estate refers to the devisee under Daniel W. Hart's will, because there is nothing here to connect the deed and the will, as was the case in 17 How., 579. To do so here is to arbitrarily supply a missing link in no manner referred to in the deed and act of the grantees, the executors. The fact is that independent of the will here, and looking only to the deed, we could not know whether Daniel W. Hart's niece had any interest in his property or not, or that he ever had a niece or a wife or a child, or that he made a will.

Spratt having acquired no legal title to this land under his mortgage purchase, for want of legal title in the mortgagor, the next question is whether he acquired any rights by virtue of Mrs. Dearing's possession. These at least passed to him under the sale if she had any possessory rights.

The possession of Mrs. Dearing, or of Caulk, her agent here, was not a possession under color or claim of title. There was no conveyance to her or her uncle, and there was no legal title or claim of title by deed. There was simply

---

---

Simmons et al. v. Spratt—Opinion of Court.

---

---

the possession, as to which Caulk testifies. He says paid taxes on the lot; that he set posts on it in 1877; that one was in actual possession then; that sometime thereafter he saw a house going up on it by a colored man; that he inquired what he was doing, and he said that Mr. Robinson told him to improve it, and that the colored man consented to hold under him. How long this colored man remained in actual occupancy, or that he is the present occupant, is not shown, and there is no evidence showing that the defendants now admitted to be in possession entered upon the occupancy of any one. There are circumstances under which a prior simple occupant without legal title and his grantees in possession have a right to eject a subsequent occupant of his grantees. Now, the defendant's entry here was without title or authority to enter under the title. So far as this record discloses, the title was and where it was under the will of I. D. Hart. The plaintiff fails to show that he or his grantees, or those whose interest he acquired under the mortgage purchase, was in actual possession of the land when defendants or those under whom they claim entered. The prior possession here contemplated must have been an actual possession. Some of the authorities say "an open, notorious and actual possession." *Seymour & Simpson vs. Creswell et al.*, 18 Fla., and cases there cited. The rule is that a wrongful ouster gives no title against an actual occupant without title. The evidence does not disclose such an ouster here.

The judgment is reversed and a new trial will be awarded.

---

---

Florida Savings Bank vs. Brittain et al.—Syllabus.

---

---

**FLORIDA SAVINGS BANK AND REAL ESTATE EXCHANGE, APPELLANT, VS. JOHN A. BRITTAIN ET AL., APPELLEES.**

1. When a certificate of sale for taxes is issued to one person, and the tax deed is made to another, there must be some evidence that the certificate has been assigned by the original purchaser. A memorandum at the bottom of the deed, below the signatures of the clerk and witnesses, with no intelligible indication that it was a part of the deed, is not evidence of the assignment.
2. The city tax roll is proper evidence to show whether the land described in a tax deed was embraced in it and duly assessed for taxes.
3. The law in force in 1874 required that a warrant should be issued to the Collector of City Taxes. His authority to enforce payment of such taxes by sale of property is derived from the statute controlling the levy and collection of State taxes.
4. A deed of land sold for unpaid city taxes is properly made in the name of the city as grantor under the laws in force in 1876.
5. Where in a suit in ejectment by a tax purchaser a deed purporting to have been made in pursuance of a sale for taxes under the act of 1874 is presented as evidence of title, and it is shown that no tax was imposed upon the property, the deed carries no right of action to the grantee as against the former owner, his heirs or assigns in actual possession. In such cases the limitations mentioned in Section 63, Chapter 1976, Laws of 1874, of causes for which a tax deed may be impeached, do not apply.

**A**ppel from the Circuit Court for Duval county.

**T**he facts of the case are stated in the opinion.

*Geo. Wheaton Deans* for Appellant.

*A. W. Cockrell* for Appellees.

**MR. JUSTICE WESTCOTT** delivered the opinion of the court.

**T**his was an action of ejectment brought by appellant

---

---

Florida Savings Bank v. Brittain et al.—Opinion of Court.

---

---

against respondents to recover lot one, in block 133, in city of Jacksonville. Defendants pleaded not guilty. Verdict and judgment for defendant, and plaintiff appealed.

At the trial plaintiff offered in evidence a tax deed dated January 10, 1880, executed by the clerk of the city, conveying the "south half of lot 1, block 98 or 133," to plaintiff under a tax sale made by the City Collector, March 8, 1876, for the taxes of 1876, the city being the purchaser. Defendants objected to the introduction of the deed on the ground that it did not appear therein that the certificate of sale had been assigned by the city to the plaintiff, the words reciting that the certificate had been "assigned to the Mayor of the city" being contained in a memorandum at the bottom of the paper, below the signatures of the clerk and witnesses, and there was nothing in or upon the paper to show that this memorandum was a part of the deed, there being simply a line drawn from a point on the margin of the body of the writing down to the memorandum, without other explanation. The court sustained the objection. The further objection that the city could not legally be the purchaser at a tax sale was not sustained by the court.

As to this deed, the only question presented by the objections of plaintiff rests upon the exclusion of the paper for the reason that it did not show that the certificate of sale had been assigned by the city, (in whose name the property had been bid off,) to the plaintiff.

Upon an inspection of the original deed, sent up by the court for that purpose, our judgment is that the memorandum at the bottom, below the signatures of the clerk and witnesses, is not a part of the deed. There is no asterisk or other indication in the body of the deed showing where the words at the bottom should be inserted, or that they belonged in or were intended to be read as a part of the deed.



---

---

Florida Savings Bank v. Brittain et al.—Opinion of Court.

---

---

per executed. There is no interlining or alteration apparent; nor does it seem that if the memorandum had been written by a third person in the absence of the parties to it, the act would have been a forgery. Whether, if the words of the memorandum had been inserted in the body of the deed, there would be sufficient evidence without other proof of the authority of the Mayor to assign the tax certificate, may be a matter of doubt. But the court ruled correctly in excluding the deed, because the city was the purchaser at the tax sale, and there was no evidence in the deed, or apart from it, that the certificate had been assigned.

The plaintiff then offered in evidence a deed dated September 5, 1876, executed by the Clerk of the City of Jacksonville, whereby the city conveyed to plaintiff lot 1 in block 133, the lot having been sold on the fifth of April, 1875, for the unpaid taxes levied in 1874, the plaintiff having been the purchaser at the sale. This deed was admitted without objection, and read. Plaintiff rested, and defendants introduced and proved the assessment book of the year 1874, and offered it in evidence to prove that there was no warrant issued by the Assessor for that year to the Collector for the collection of any taxes assessed; and that there was no assessment of the premises for the taxes of that year.

Plaintiff objected to the book as evidence for the purpose stated, and that the evidence offered was not material. The objection was overruled, and the book admitted.

There was no warrant annexed to the book, or contained therein, signed by the Assessor, directing the Collector to collect the taxes therein mentioned, but the book contained a certificate of the City Assessor in the usual form that the book contained the assessment and valuation of property liable to be taxed.

---



---

 Florida Savings Bank v. Brittain et al.—Opinion of Court.
 

---



---

The Judge charged the jury as follows: "If the jury find from the evidence that there was no warrant annexed to the assessment roll for the taxes of 1874, delivered to the City' Collector, then they will find for the defendant." This was duly excepted to.

The jury rendered a verdict in favor of the defendant, upon which judgment was entered.

The assessment book was offered in evidence for two purposes, one of which was to show that the lot in question was not assessed for the taxes of 1874; and the other was to show that no warrant had been issued to the Collector.

One of the questions presented in argument was whether the tax deed should name the State of Florida or the city as the grantor, it being contended by respondent that as this deed is not made in the name of the State, but in the name of the city, it is not the deed prescribed by law, and is void.

The act of 1869 providing for the incorporation of cities authorized the election of an Assessor and Collector of City Taxes. It also authorized the raising by tax and assessment upon all real and personal property of the money necessary to carry on the city government, "and to enforce the receipt and collection thereof in the same manner" provided by law in relation to State taxes. Sections 23, 24.

The Revenue Act of 1874, ch. 1976, made it the duty of the Collector to collect taxes by levy and sale of real and personal property. Sec. 42. And section 56 directs the Tax Collector of a city to proceed substantially in the same manner in the collection of taxes and sale of lands for the non-payment of taxes as Collectors of Revenue; and section 61 directs the Clerk of the City to make deeds for lands sold for unpaid taxes substantially in the form to be used by the County Clerk, as provided by section 60.

The Revenue Act of 1874 required the County Assessor

---

---

Florida Savings Bank v. Brittain et al.—Opinion of Court.

---

---

to annex to the assessment roll delivered to the Collector a warrant directing him to collect the State and county taxes. In *The State vs. Rushing*, 17 Fla., 223, and in *Donald vs. McKinnon*, *ib.*, 746, this court held that in the absence of a warrant to the Collector of Revenue he was not authorized to make a sale, and the sale would pass no title.

The twenty-third section of the act of 1869 authorized and required the City Council to enforce the receipt and collection of taxes "in the same manner" as provided by law for the assessment and collection of State taxes. If this has any meaning, it is that the city authorities shall employ substantially the same machinery for such purposes as was provided in the case of State taxes. This included an assessment by an Assessor, in which duty he is required to make a list of taxable property with a valuation thereof, in the name of the owner if known, and to apportion the due quota of taxes to each parcel of property, and to issue a warrant addressed to the Collector, directing him in the name of the State to collect the taxes set down in the assessment roll against the names of the owners and the property. This is the Collector's authority to collect.

The proper conclusion is that a warrant is a necessary part of the machinery for the collection of city taxes, because it is necessary in the case of State and county taxes; and that the instruction to the jury in this respect was correct.

As to the objection urged in this court that the deed is not in the form prescribed by law, in that the city is the grantor, and the form of deed as given in the act of 1874 reads that the State of Florida grants the land, section 62 of the act says: "All tax deeds shall be issued in the name of the State, shall be signed by the County Clerk, shall be witnessed by two witnesses, and the seal of the County Court attached thereto." Section 61 reads that "the Clerk

---

Florida Savings Bank v. Brittain et al.—Opinion of Court.

---

of the City shall make the deed for lands sold in the city for the non-payment of city taxes, and not redeemed, substantially in the same form" as provided in the case of deeds for State and county taxes.

In this case the deed is found to be *substantially in the same form*. The 61st section applies only to deeds for unpaid city taxes, and section 62 applies only to deeds for unpaid State and county taxes. In the one case the city is the proper grantor, and in the other the State is the grantor. We held this in *Sams vs. King*, 18 Fla., 557, 572, and we find no reason for doubting the correctness of the conclusion.

By the statute a deed in due form duly executed, for the non-payment of taxes, by the proper officer of the city or the county, is *prima facie* evidence of title in the grantee. *Sams vs. King*, *supra*, 566.

The question next presented is whether the assessment book, which has been sent up for inspection, contains evidence that the lot in question was duly assessed, and a tax levied so as to constitute a charge upon it, and authorize a sale for non-payment. The entries in the assessment book are as follows, on page 47: "Name of owner, F. M. Richard. No. of block, 133 or 98. No. of lot, 1. Valuation, 250." There is no tax set down against it. In another part of the book, some thirty pages intervening, we find this entry: "F. M. Richard. Valuation of real estate 250. Total, 250. Amount tax, 5.00, paid by sale," without designating the real estate chargeable with the tax.

The 63d section of Chapter 1976, Laws of 1874, provides that the recording of a tax deed made in pursuance of a sale of lands for taxes, shall be deemed such assertion of title or such entry into possession, as to authorize suit or proceedings against the purchaser as for an actual entry. But such suit or proceeding shall be commenced by the form

*owner or claimant*, his heirs or assigns, or his or their legal representatives, to set aside a deed made in pursuance of any sale of lands for taxes, or against the grantee in such deed, his heirs or assigns or legal representatives, to recover the possession of said lands, unless such suit or proceedings be commenced within one year after the recording of such deed in the county where the lands lie, except upon the grounds that the said lands were not subject to taxation, or that the taxes were paid or tendered, together with the expenses chargeable thereon, before the sale, or that the property so sold had been redeemed according to law. See *Sams vs. King*, 18 Fla., 568.

The present case is ejectment, not by the *former owner or claimant*, against the holder of a tax deed in possession, or having been in possession, actual or constructive. What we have here is ejectment by the holder of the tax title against a party in possession under the owner, after the expiration of one year from the recording of the tax deed. I do not think the statute contemplates that the recording of the deed is to be held equivalent to an actual entry. Where the suit is by the holder of the tax title after the expiration of the year, except where the land can be the subject of an actual entry; and if the tax sale purchaser with a deed is not in possession, or has not been in possession, actual or constructive, (that is, such possession as follows legal title, in the absence of actual possession,) or has not had sufficient possession, actual or constructive, to confirm his right, his right of action against one in actual possession is not affected by this section. In other words, that under these circumstances his tax deed is evidence only *prima facie* of the regularity of the proceedings under section 60 of the statute. This being so, the evidence here as to the matter of the assessment was such as to vitiate the sale. It was not an assessment under the law.

---

---

Florida Savings Bank v. Brittain et al.—Opinion of Court.

---

---

There is no doubt of the power of the Legislature to make a tax deed, regular in form, conclusive evidence of the regularity of all the antecedent proceedings, including the matter of making a legal and proper assessment, and to enact that none of these questions shall be the subject of process after the expiration of a year from the recording of the deed; and that the land owner shall have no cause of action except upon the grounds that the lands were not subject to taxation, or that the taxes were paid or tendered together with the expenses chargeable thereon, before sale, or that the property so sold had been redeemed according to law. And I think that is what the Legislature has here enacted. The views expressed by the Supreme Court of the United States, in the case of *DeTreville vs. Smalls*, 98 U. S. 517, abundantly sustain this view. The act of Congress there construed declared that the Commissioners' certificate of sale for taxes should be evidence of compliance with the preliminary requisites of the sale, and that this evidence should be rebutted only by proof that the property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed. The Supreme Court sustains the act, and remarks: "This left to the owner of land subject to the tax every substantial right. It was his duty to pay the tax when due. His land was charged with it by the act of Congress, not by the act of the Commissioners, and the proceeding ending in a sale was simply a mode of compelling a discharge of his duty. This is true of the act of the legislature here. The court says further: "All his substantial rights were assured to him by the permission to show that he owed no tax; that his land was not taxable; that he had paid what was due, or that he had redeemed his land after sale. He was thus permitted to assert everything in substance, everything except mere irregularities." T

---

---

McLean v. Spratt—Syllabus.

---

---

court further remarks that “of late the astuteness of judicial refinement has rendered almost inoperative all legislative provisions for the sale of land for taxes, and the consequence is that bidders at tax sales, if obtained at all, are mere speculators.” We have nothing to do with the policy or propriety of the statute; that is with the Legislature. I do think, however, that legislation, or legislation so construed by the Judiciary, as really to vest no title under tax sale proceedings, has been tried, and has been found to be a failure. This fact I think the Legislature of this State, like the Legislatures of several other States, has recognized; and in this act we see an endeavor to give some force to a tax title, thereby securing bidders other than those notoriously for speculation; and also advising the citizen that he must pay his taxes, like all good citizens should do, or his property will be sold to some purpose. Such doctrines or views are eminently proper, because they are plainly right.

The sixty-third section, by its language and intent, can be made applicable only to a case where the former owner is proceeding to set aside the deed, or to recover the land from the tax purchaser, his heirs or assigns.

The judgment is affirmed.

---

W. A. McLEAN, APPELLANT, vs. L. W. SPRATT, APPELLEE.

1. In proceedings under the unlawful detainer act against a tenant to recover possession, the tenant cannot show as a defence that his lessor had no title, or that his title was defective, or that it was only an equitable title. The tenant's liability does not depend upon the rights of third persons but on his contract with the lessor.

---

 McLean v. Spratt—Opinion of Court.
 

---

2. If the purpose of putting a question to a witness is not apparent with reference to the pleadings or to the testimony already given, it is not error to overrule the question, unless its object be stated so that its materiality may be made manifest.
3. A demand of a tenant by his landlord of the amount of rent due, is a sufficient demand of the *precise sum* due without naming the amount, in a suit to recover possession for non-payment.
4. Double the rental value of premises is not recoverable in a suit for an unlawful detainer unless it appears affirmatively from the testimony that the detention was wilful and knowingly wrongful on the part of the tenant.
5. Where in the proceedings in a case like the present there is no error found on appeal, except that the jury have given excessive damages and the correct amount is easily ascertainable, the judgment will be reversed unless the excessive amount of damage is remitted.

Costs in this court taxed against appellee.

Appeal from the Circuit Court for Gadsden county.

The facts of the case are stated in the opinion.

*Geo. Wheaton Deans* for Appellant.

*A. W. Cockrell, John T. & Geo. U. Walker* for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court -

This was a suit brought by respondent as plaintiff against appellant as his tenant, to recover possession of certain premises, to-wit: rooms in the (so-called) Freedman's Bank Building, in Jacksonville. The suit was brought under the statute, sec. 4, chapter 1630, Laws of 1868. The case was before us on appeal at June term, 1882, (19 Fla., 97.) The testimony as to the possession of the plaintiff and the contract of tenancy was substantially the same as on the previous trial, and supports the verdict of the jury as to the fact that appellant was the tenant of plaintiff from the first day of April, 1880, under a verbal agreement by



---

---

McLean v. Spratt—Opinion of Court.

---

---

which appellant was to pay twenty-five dollars per month, payable monthly, and further, that he was to have thirty days' notice to quit.

The suit was commenced June 5, 1880, and the verdict rendered November 26, 1883, being three years, five months and twenty-six days. The jury found in favor of the plaintiff, and assessed the damages at \$2,195. Plaintiff remitted one hundred dollars, and judgment was entered against defendant upon the verdict, less \$100 of the damages.

1. The first exception is taken to the ruling of the court sustaining plaintiff's objection to the following question by defendant's attorney to the plaintiff: "was a deed of the land tendered you by the agent of the Commissioners of the Freedman's Savings and Trust Company, and did you refuse to take the deed and pay the balance of the purchase money the latter part of the month of May ensuing, say the 29th day of May?"

The testimony had shown that plaintiff bid in the property at a public sale made by the Commissioners on the 25th March, 1880, had paid an installment of purchase money, and had been placed in possession by the agent of the Commissioners; and the defendant had, by the assent of both parties, attorned to plaintiff.

If the object of the question was to show that the sale had not been perfected owing to differences that had arisen between the parties to it, and that plaintiff was not lawfully entitled to the possession as between himself and the Commissioners, it was not a material question in the case. The controversy between the parties claiming the legal or equitable title cannot be tried in this proceeding, and it does not concern this defendant. Nor can this defendant, as a tenant, question the title of his lessor. If other parties have interests antagonistic to the claim of the plaintiff to this property, they should seek a wider jurisdiction, and

---

 McLean v. Spratt—Opinion of Court.
 

---

make proper parties. This defendant as a tenant, even if the action had been ejectment, "cannot show that his lessor had only an equitable title, or that his title was probably defective." Taylor's L. & T., §707; 8 T. R., 487; 2 W. Bl., 1259; Blight's Lessee vs. Rochester, 7 Wheat., 535, 547. The question was properly excluded. Defendant's liability does not depend upon the rights of third persons, but upon his contract with plaintiff. If there was any other object in proposing the question than those we have indicated, it is not apparent.

2. The next exception is to the exclusion of the question "Are you now in possession of the premises in question?" which was put by defendant's counsel to defendant as witness. The object of the question was not stated and is not patent. If the purpose was to show that defendant had surrendered possession to the plaintiff it should have been so stated. If it was to show that plaintiff had assigned his lease, that should have been stated. If it was to show that defendant had attorned to some other than plaintiff, or given possession to some third party without plaintiff's consent, it was not a proper matter of defence. We do not see where the error lies in the ruling.

3. A further exception is that the court excluded a question by defendant's counsel to Mr. Greeley, to wit: "Did you have any authority from the Commissioners of the Freedman's Savings and Trust Company to make any such statement?" Mr. Greeley had said that he "never stated at the time of the alleged sale that the purchaser should be put in possession of the premises upon the payment of any sum less than the full amount of the purchase money," and this had reference to testimony as to what had been stated by Mr. Greeley at the time of the sale to plaintiff.

As this referred to the controversy between plaintiff and the Commissioners of the Freedman's Savings and Trust

---

**McLean v. Spratt—Opinion of Court.**

---

Company, a matter which cannot be adjusted in this suit, the question was not material to this defendant. The testimony showed that plaintiff had peaceable possession as a purchaser; that Greeley had given him a list of the tenants, of whom this defendant was one; that defendant had, in Mr. Greeley's presence, and in his office, agreed with plaintiff to become plaintiff's tenant, and to pay him the rent, and that at the end of the first month, on being called on for the month's rent, promised to pay it. At the end of the second month he said he was willing to pay, but Mr. Greeley had notified him that he, Greeley, claimed the rent on the ground that plaintiff had not fulfilled his agreement about the purchase. The whole testimony satisfied the jury that plaintiff had been put in possession as a purchaser, and that a controversy afterwards arose between plaintiff and Mr. Greeley, who was acting in behalf of the Commissioners, in respect to the completion of the bargain and sale. If we understand the purpose of the question asked, it is to enter into the controversy between plaintiff and the Commissioners, or their agent, which controversy or disagreement arose some weeks after the possession of the plaintiff and leasing by him to the defendant. It is an effort by the tenant to show defect in the plaintiff's legal or equitable title. Whatever the rule in ejectment, the inquiry cannot be allowed in this proceeding. Taylor's L. & T., §707; Chap. 1630, Laws 1868, Sec. 20.

4. The Judge charged the jury: "If you believe from the evidence that the defendant was in possession of the premises sued for when this action was commenced, and that the defendant recognized the plaintiff as his landlord, after the 25th of March, 1880; that previous to the commencement of the action the plaintiff made a demand on the defendant for payment of rent then due, and that

## McLean v. Spratt—Opinion of Court.

the defendant refused to pay, then they should find a verdict for the plaintiff."

This is excepted to on the grounds that it assumes there was evidence when there was none, to wit: as to the defendant's recognizing plaintiff as his landlord, as to the demanding of rent, and the refusal to pay; and that the charge is obscure, indefinite and tends to mislead the jury.

These grounds of exception appear to be without foundation. Nothing is assumed as to the proof, and the charge seems to be a correct legal proposition. It strips the case of everything but the issues between these parties, and confines the jury to the facts proved.

5. Another exception is that the Judge refused to charge that "unless you are satisfied from the evidence that the plaintiff demanded of the defendant the precise amount of the rent claimed to be due of the defendant, before the filing of this complaint, and that the defendant refused to pay it, your duty is to find a verdict for the defendant."

The Judge had charged that if they found "that previous to the commencement of the suit the plaintiff made demand on the defendant for payment of rent then due, and the defendant refused to pay," with other facts required to be proved, they must find for plaintiff. This is equivalent to charging that if they did not find from the evidence that such demand had been made and payment refused, they must find for defendant. Counsel in the argument place stress upon the language, "the precise amount due," and that the Judge did not use these words, or similar language, and cites Taylor's Landlord & Tenant, §493, to the effect that there must be a "formal demand of the precise sum due for the last current quarter." The case cited in that book as authority is Doe vs. Paul, 3 Car. & P., 613. Reference to that case shows that demand was made for the sum of 193 l., 10 s., whereas the quarter's rent was but

---

---

McLean v. Spratt—Opinion of Court.

---

---

one-fourth of 75 l., and the court said: "The demand should have been for a *quarter's rent* only." The testimony of Spratt and McLean agrees that the monthly rent was to be twenty-five dollars, payable monthly. Spratt testifies that at the end of the first month he called upon McLean for the rent, and McLean "said he would pay me, knowing he was responsible," but did not pay, and Spratt did not then press him. "On the last day of May I again called on him in reference to the rent. He then declined to pay me on the ground that J. C. Greeley claimed that the rent was due him. The next day I instructed my attorney, A. W. Cockrell, telling him what had occurred, to make demand for the rent then due," and if it was not paid to demand possession of the premises.

The next day Mr. Cockrell saw McLean, and he testifies that he "demanded the rent due for the premises he was then occupying to L. W. Spratt. McLean declined to pay Spratt the rent upon the ground that Greeley claimed it." Mr. Cockrell then gave McLean a written notice, as follows: "To W. A. McLean, Esquire—Take notice, I hereby make demand upon you for the payment of the rent due from you for the tenements occupied by you in the Freedman's Bank Building in the City of Jacksonville in said county as a cigar factory in the room used in connection therewith, or that you surrender the possession thereof. This June 1st, 1880. (Signed) Leonidas W. Spratt, by A. W. Cockrell, his attorney."

McLean "declined to accede to the demand, and within a few days thereafter suit was brought." The demands here testified to are of the amount of rent due, as to which there was no controversy. The first demand was at the end of the first month, and the subsequent demand at the end of the next month. The demands were of the precise amount due, to all intents. The words "unless you pay

---

---

McLean v. Spratt—Opinion of Court.

---

---

what you owe me I shall take immediate measures to cover possession of the property," addressed to a tenant will, were held a sufficient demand to maintain ejectment. *Doe vs. Price*, 9 Bingham, 356. The common sense of the rule is that if the plaintiff demands what he is entitled to in language easily understood, it is sufficient. The neglect and refusal to pay the rent due after demand put an end to defendant's right of further occupancy under his contract. "In this case the right to retain could only have been terminated by a notice to quit, or by non-payment of the rent after demand." *McLean vs. Spratt*, 19 Fla., 101.

The instruction which the Judge gave was, therefore, applicable to the testimony, and covered the essential position of the defendant's counsel. The jury were as clearly apprised of the rule of law to be observed as though it had been repeated in the form proposed.

6. The remaining exception to the charge of the court is to this language, given at the request of plaintiff's attorney: "If the jury find for the plaintiff, they may assess his damages at double the rental value shown by the evidence from the time when the unlawful holding by the defendant commenced, up to the present day, unless they are satisfied from the evidence that such unlawful holding or detention was not willful and knowingly wrongful; if the jury are satisfied from the evidence that such detention was not willful and knowingly wrongful, then they assess the damages at what they find from the evidence to be simply the monthly rental value."

"In all cases arising under this act," it is provided by section 14, "evidence shall be admitted as to the monthly rental value of the premises, and in case of recovery by the plaintiff the jury shall fix his damages at double the rental value of the premises from the time of such unlawful or wrongful holding, as to which evidence shall

---

---

McLean v. Spratt—Opinion of Court.

---

---

admitted: *Provided*, That damages in no case of detainer shall be fixed at more than the rental value of the premises, unless the jury be satisfied from the evidence that such detention is willful and knowingly wrongful."

The verdict in this case was for double the amount of the monthly rental value, as ascertained by the jury from the contract. This verdict must have been found under the instruction given, that the plaintiff was entitled to double damages, "unless they are satisfied from the evidence that the detention was *not* willful and knowingly wrongful;" whereas the act says the plaintiff is entitled to single damages only, unless the evidence shows affirmatively "that the detention *was* willful and knowingly wrongful."

From the evidence in this record we do not think the detention is shown to be willful and knowingly wrongful. McLean, the defendant, says he was always ready and willing to pay the rent to whoever had the right to it. He acknowledges his tenancy to Spratt, and says he had been the tenant of Greeley as agent, &c. A controversy arose between Spratt and his predecessor, involving the validity of the transfer of the property to Spratt, and both parties claimed the rent from McLean, who simply hesitates between the claimants because he wants to be protected against paying twice. He declines to settle the question of law and fact between them at his own risk, and this is all. He has paid rent to neither of them. When he was notified by Greeley not to pay Spratt, about the latter part of May, he says: "I was bothered what to do; as I said before, I did not want to pay it but once."

This is far from showing a *willful and knowingly wrongful* detention by defendant. To support the claim for double damages against a tenant, (not a trespasser who has driven the plaintiff out of possession) something more than a refusal to pay rent or to quit, under circumstances which

---

---

McLean v. Spratt—Opinion of Court.

---

---

might well induce a prudent man to hesitate between the claimants, must be shown. The statute does not contemplate that every tenant who fails to pay rent may be fined to that extent, but it requires affirmative proof of "willful and knowingly wrongful" conduct.

There was error in the assessment of double the rental value of the premises, from the first day of June, 1880 to the day of rendering the verdict, November 26, 1883; a period of three years five months and twenty-six days at \$25 per month. The rent for this period amounts to one hundred and forty-six dollars and sixty-six cents. We find no other error in the proceedings.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and a new trial granted, unless the appellee, (plaintiff below) within twenty days after filing of the mandate of this court in the office of the Clerk of the Circuit Court, the plaintiff or his attorney, shall file with the Clerk of said Circuit Court a *remittitur* of so much of the damages as awarded by the judgment entered as may exceed the sum of ten hundred and forty-six dollars and sixty-six cents; in which case the judgment will stand for this amount of damages, and the costs properly included in the judgment of the Circuit Court. If such release shall not be entered, the judgment will be vacated and a new trial awarded. The costs of this appeal will be taxed against appellee.



---

---

City of Jacksonville v. Basnett et al.—Syllabus.

---

---

**THE CITY OF JACKSONVILLE, APPELLANT, VS. A. D. BASNETT ET AL., APPELLEES.**

1. The title of a statute is "an act to amend section 23 of an act approved February 4, 1869, entitled an act to provide for the incorporation of cities and towns and establish a uniform system of municipal government in the State." The body of the act containing the amendment consists of three sections. The first section gives the city power to raise by tax and assessment money for general municipal purposes. The second section prescribes a method of valuation, limits the tax, and restricts appropriation. The third section legalizes assessments made before the passage of the act by the city according to the act then regulating assessments, and gives the power to enforce and collect the tax. The subject of the various sections of this act concerns the matter of taxation by cities for municipal purposes, and the general subject of the act as expressed in its title is the establishment of municipal governments. The act, therefore, is not in conflict with Section 14, Article IV of the Constitution. The act embraces but one subject and matter properly connected therewith, and that subject the title briefly expresses. *Gibson vs. The State*, 16 Fla., 291, cited and followed.
2. An assessment of a tax is declared illegal by the courts for want of power in the municipal government to impose such a tax. The Legislature subsequently legalizes the assessment and confers the power to levy the tax. The power to collect and to levy is not retrospective, and to the extent that the legalizing the assessment is retroactive, it is within the power of the Legislature, unless there is some other objection to it than that it is retroactive. If the assessment is such as the Legislature could have authorized at the time in the event the city had then the power to levy it, it can legalize it for future action by the city under the newly granted power.
3. The Legislature does not by such act directly levy the tax. The whole machinery for its assessment and collection is put in operation by the city except the original power to collect such tax, and this is simply an assessment and collection of a tax by the city, which tax is authorized by the Legislature: *Quere*, Whether the Legislature can directly assess, levy and collect a

---

---

City of Jacksonville v. Basnett et al.—Opinion of Court.

---

---

tax of this character. (Section 6, Article XII, of the Constitution construed so far as it relates to this legislation.)

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

*O. J. H. Summers* and *C. P. & J. C. Cooper* for Appellant.

*A. W. Cockrell, John T. & George P. Walker* for appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The appellees, Basnett and others, filed their petition before the Judge of the Circuit Court, under section 4, chapter 151, Laws, which authorizes the Judge to set aside illegal assessment of taxes upon petition setting forth such illegality, accompanied "with the evidence to sustain it." At January Term, A. D. 1883, a like case was presented to this court, and we there held that the assessment as it then appeared was not lawfully made. *Basnett vs. City of Jacksonville*, 19 Fla., 664. By reference to that case it will be seen that this court held that section 23 of chapter 1688, Laws, as finally amended, and section 8 of chapter 3024, Laws, took away the power of the city to tax for general municipal purposes; that the assessment then complained of was an assessment of a tax for such general purpose, and that it was therefore an "assessment not lawfully made." Since that decision the Legislature has passed a statute, the purpose of which was to remedy the effect of that decision and give vitality and effective operation to the assessments then made, so that the taxes might be collected and the municipal government maintained. The title of this act whē

---

---

City of Jacksonville v. Basnett et al.—Opinion of Court.

---

---

is chapter 3477, Laws of 1883, is “an act to amend section 23 of an act approved February 4, 1869, entitled an act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this State.” This act consists of three sections. The first section proposes to amend section 23 “so as to read as follows,” and then follow clauses giving the city the power to raise by tax and assessment sums of money for general municipal purposes and for carrying out the powers and duties imposed by the act of February 4, 1869. This act also prescribes the manner in which property shall be valued, fixes a limit to the taxes to be levied as well as to the appropriations to be made, and regulates the issuing of warrants upon the treasurer. Then follows this provision: “That all collections and assessments heretofore made of taxes conformable to the provisions of said act, approved February 4, 1869, and the above sections of this act, are hereby legalized and confirmed, and all taxes so assessed and levied and not heretofore paid, including license taxes, may be enforced and collected in the manner provided by law for the collection of State taxes, notwithstanding such assessment or levies may have been made after the time contemplated by said act of February 4, 1869, or by the provisions of the above sections, had they been in force at the time of such assessments and levies being made, or any municipal ordinance, and notwithstanding a failure to give the notice required under the act approved March 3, 1881, entitled an act prohibiting special taxation in certain cases.”

The position is now taken that this section legalizing and confirming these antecedent assessments of taxes for general purposes of the corporation and the taxes so assessed and levied and not paid is unconstitutional and void,

---

City of Jacksonville v. Basnett et al.—Opinion of Court.

---

and as a consequence that the assessments remain as we pronounced them in the previous case, unlawful.

It is insisted first that the statute is in conflict with section 14, art. 4, of the Constitution, which provides that "each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title." This act in its title refers to antecedent legislation incorporating cities and towns and establishing a system of municipal government. This clause proposes to give validity to assessments of taxes before that time made by cities and towns, but which had been pronounced unlawfully made. The subject of the whole act from beginning to end concerns the matters of taxation by cities for municipal purposes. Here is clearly one subject and matter properly connected therewith, as the paying the expenses incurred in the past administration of the city government by collecting taxes for that purpose is a matter as much connected with the city as a provision for the collection of the taxes for the future. This case clearly comes within our ruling in *Gibson v. The State*, 16 Fla., 291. All matters here properly connected with the establishment and efficiency of municipal governments in this State, including the general subject of taxation, past, present or future, would come within the subject expressed in the title to this act. *Cooley Con. Lim.*, §144.

It is further insisted that the Legislature is prohibited from the enactment of section 3 of the statute by section 6, art. 13, of the Constitution, which provides that "the Legislature shall authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes." We presume that the clause of the Constitution to which reference is here intended to be made is section 6 of art. 12, which provides that the "Legisla-

---

---

City of Jacksonville v. Basnett et al.—Opinion of Court.

---

---

ture shall authorize the several counties and incorporated towns in the State to impose taxes for county and corporation purposes and for no other purpose, and all property shall be taxed upon the principle established for State taxation. The Legislature may also provide for levying a special capitation tax and tax on licenses. But the capitation tax shall not exceed one dollar per annum for all purposes, either for State, county or municipal taxes." This clause of the Constitution, we, to some extent, construed in advisory opinions to be found in 13 Fla., 688 to 699. Without grant of power, express or implied, by the Legislature to municipal corporations to levy a tax, they would be powerless to do so, and without money, the corporation itself would cease to exist for all practical purposes. This clause upon its face simply makes it the duty of the Legislative Department of the government to grant the authority to impose taxes to municipal corporations restricting the power, however, to tax for corporation purposes only. The power to impose taxes is to be granted. The only limitation is that they shall be for corporation purposes. Whether the tax is to pay debts already incurred or to be incurred is not specified. This is all there is of it. This clause does not in terms, or by any necessary implication, prohibit the Legislature from passing a statute of the character now under consideration. The case here presented is thus: A municipal corporation supposing it had been granted by the Legislature the power to impose taxes for general municipal purposes does so; objection is made by the citizen to the assessment as unlawful; it is so declared by the courts, and the Legislature, to remedy the defect, passes an act conferring the power to impose a tax for general purposes. In addition thereto, the Legislature enacts that all collections made on such account therefore are legalized. The Legislature further enacted that all assessments made be-

---

---

City of Jacksonville v. Basnett et al.—Opinion of Court.

---

---

fore the passage of the act, which are conformable to provisions of the act establishing the municipal corporation, are legalized and the corporation is authorized to force and collect them. The question then is, whether the Legislature has the power to grant to the municipal corporation the right to tax and to collect and enforce the same so authorized to be imposed, according to a previous assessment made, the amounts when collected to be applied to the purposes authorized by the Constitution. It is, strictly speaking, in every sense a retroactive law. It authorizes the future imposition and collection of a tax for municipal purpose, such tax to be levied according to the past assessment made by the city, under the impression that the Legislature had conferred the power to impose the same.

The third section legalizes "collections" already made under such previous assessment. The purpose of the act of the Legislature was to enable the city to collect from the resident tax payer the same tax which the willing tax-payer paid and the very best method to secure the uniformity and equality required by the Constitution was to adopt the assessment according to which other citizens had contributed to the expenses of the city. It is urged, however, that the Legislature, by thus acting, is itself levying the tax while the Constitution requires that it can only authorize the city to impose taxes; the argument being that the previous assessment being unlawful for want of power in the city to levy the tax such assessment must be treated as if it "*had never been*" and that this act amounts to a direct levy by the Legislature. Whether the Legislature under our Constitution may directly impose a tax we deem unnecessary to determine because in our judgment such is not its act here. The Legislature here enacts that the act of the city heretofore void for want of power shall for the future collection of this tax be effective by the grant

---

---

City of Jacksonville v. Basnett et al.—Opinion of Court.

---

---

power to impose such a tax. It makes no assessment itself. It declares that an assessment already made by the city may be enforced by the city. It authorizes the city thus to apportion the tax. When this case was here before we were obliged to treat this assessment as if it had "*never been made.*" Now, however, the question is, has the Legislature the power to make this act of the city effective for the future collection of a tax by the city otherwise unobjectionable. I do not understand that there is any objection to the apportionment made by this assessment. In treating of this subject some of the text writers say that a re-assessment is perhaps the best method of remedying a defective assessment. But where does the Constitution provide that a past assessment unlawful for want of legislative authority only to levy the tax cannot be made effective in the future by conferring the power to levy the tax and legalizing an apportionment under a proper assessment before that time made. Acts "to legalize prior assessments made when there was no law authorizing the same and making provisions for levy and sale for non-payment" have been repeatedly held to be valid acts. *Wade on Retroactive Laws*, §252; *Boardman vs. Beckwith*, 17 Iowa, 294; *Grim vs. Weissenberg*, 57 Penn. State, 436. Such acts do not impair the obligation of any contract or interfere with vested rights.

All the prior transaction that is here affected is this assessment. The tax, so far as it is to be collected, will be by virtue of an antecedent authority to impose it, which is granted to the city by the third section of this act. So far as the assessment is concerned the legislation is retroactive or retrospective and no objection can be taken to it except that it is retroactive. The past assessment as made by the city violates no organic rule of taxation or requirement of equality or uniformity or other limitation upon legislative power. The primary cause of the difficulty here was

---

---

City of Jacksonville v. Basnett et al.—Opinion of Court.

---

---

want of a legislative grant of power to impose this tax. This power is now given and the city has imposed the tax, adopting, as authorized by the Legislature, a past assessment which the city made. Re-assessments are frequently made and sustained when there are irregularities remediable by the Legislature. And so far as any constitutional limitation upon the power of the Legislature is concerned we can discover no great difference between legalizing a past assessment, the power to authorize which the Legislature had at the time it was made (as it had in this case the power to authorize the tax and the assessment) and the granting of the power to make a re-assessment of the same tax on account of irregularity in the first assessment. Certainly there is no such difference as would render one constitutional and the other unconstitutional. We are not dealing here with vested rights or acts granting divorces, legalizing marriages or validating invalid contracts. Certainly these petitioners neither have or had the right to enjoy the protection and benefits of the various kinds which follow municipal organization and government, and at the same time have a vested right against contributing to the expenses thus incurred by the municipality. We can discover no ground upon which we can declare this statute unconstitutional.

The judgment and order is reversed, and the case will be remanded with directions to dismiss the petition.



---

---

Deans v. King's Executrix—Opinion of Court.

---

---

## GEO. WHEATON DEANS, APPELLANT, vs. KING'S EXECUTRIX, APPELLEE.

1. The plaintiff in an action against an executor for professional services as an attorney and counsellor at law, rendered for the testator, after proving his book of accounts by his suppletory oath, offered to prove by his own oath that the services so charged were actually performed by him, and that the sums so charged were reasonable and just, but the court excluded such evidence: *Held*, That such exclusion of the testimony of the plaintiff as to those facts was error.
2. Such evidence, introduced on the part of the plaintiff by his own oath, is not in contravention of the law of February 14, 1874, which only prohibits testimony of "transaction, or communications," in such cases.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

*Geo. Wheaton Deans* for Appellant.

*A. R. Meek* for Appellee.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

Geo. Wheaton Deans brought action for assumpsit against Rufus T. King on two promissory notes, and also an account for professional services. The defendant pleaded and issue was joined. Subsequently the defendant died, and Chloe W. King, his executrix, by consent of the parties, was made a party defendant. The cause was tried in December, 1883, and the jury found for the defendant. The plaintiff moved for a new trial for the reason that the verdict is contrary "to the law and contrary to the evidence."

---

Deans v. King's Executrix—Opinion of Court.

---

The motion for new trial was denied, judgment was rendered for defendant, and the plaintiff brings his appeal.

The errors assigned are as follows:

1st. The court erred in refusing to set aside the verdict of the jury and grant a new trial.

2d. The court erred in refusing to allow the plaintiff to testify that the services charged for in his book of accounts were actually performed.

3d. The court erred in refusing to allow plaintiff to testify that the charges so made were reasonable and just charges.

The bill of exceptions as embodied in the record, except as to the formal parts, is as follows:

"Plaintiff to maintain the issue on his behalf offered his certain book of accounts, kept in the regular course of his business as an attorney and counsellor at law, containing the charges against Rufus T. King of \$50, \$10, \$10 and \$5, as set forth in his declaration in the cause, and was permitted by the said Judge to make his suppletory oath, was duly sworn, to wit: that said book of accounts was his book of original entries; that the charges therein were in his own hand writing; that they were made at the time they purported to have been made, and at the time the services were rendered." That thereupon the said Judge inspected the said book, and then and there admitted it in evidence. The plaintiff having been duly sworn further offered to testify that the services therein charged as aforesaid were actually performed by him, the said plaintiff, as attorney at law and counsellor. The defendant, by his attorney, objected to the testimony thus offered, and it was ruled out by the said Judge, and the plaintiff then and there excepted to the said ruling. The plaintiff further offered to testify that the sums so charged were reasonable and just charges. The defendant, by his attorney, objected to such testimony,

---

---

Deans v. King's Executrix—Opinion of Court.

---

---

and it was ruled out by the said Judge, to which said ruling by the said Judge the plaintiff then and there excepted. The plaintiff here rested his case. The defendant offered no testimony, and the said Judge gave no charge to the jury, but submitted the said issue and the evidence so given on the said trial to the jury, and the jury aforesaid then and there gave their verdict for the said defendant.”

It will be seen that the promissory notes were not proven or before the jury, and that the only question was that in relation to the professional service mentioned in the declaration, which plaintiff attempted to prove by the introduction of his book of accounts, and his own oath.

The book of accounts in this case was inspected by the Judge and admitted as evidence. That book is not before us in the record, and as there was no objection to its admission we must hold that it was proper in form, that it appeared to be a register of the business of the party and to have been honestly and fairly kept. The plaintiff in his evidence (which is nowhere contradicted in any respect, no other witness having been sworn) says that the book of accounts was his book of original entries, that the charges in it were in his own hand writing, and that they were made at the time the services were rendered. The amount claimed by the plaintiff in his declaration for such professional service was seventy-five dollars, and the books shows that amount charged in four different items. The plaintiff then offered to prove by himself that the services charged upon such book were actually performed by him as an attorney and counsellor at law. The court, upon an objection being made to such evidence, excluded it. He further offered to testify that the sums so charged were reasonable and just charges, which offer was also overruled, and he was not permitted to so testify. The laws of this State, chap. 1983, Act February 14, 1874, provides that no party

---

 Jeffreys et al. vs. Coleman—Syllabus.
 

---

to an action, nor any person interested in the event thereof, shall be examined as a witness in regard to any "transaction or communication" between such witness and the person at the time of such examination deceased, against the executors or administrators of such deceased person. In the case of *Belote vs. Bell, Adm'r, &c.*, 20 Fla., we have had occasion to examine this question, and there cite Fla., 457; *Ib.*, 809, 820. We cannot see that if the plaintiff had testified that the services so charged upon the books were actually performed and, that the sums so charged were reasonable and just charges, that he would have been testifying to any "transaction or communication" with the deceased. His testimony in those respects should have been admitted. *Leggett vs. Glover*, 71 N. C., 211; *Codman vs. Caldwell*, 31 Maine, 560; *Cummings vs. Nichols*, 13 N. H., 420; *Strickland vs. Wynn*, 51 Ga., 600; *Abbott's Trial Evidence*, 67.

The judgment is reversed and a new trial awarded.

---

CHARLES R. JEFFREYS ET AL., APPELLANTS, vs. W. COLEMAN, APEELLEE.

1. When a suit is commenced by summons and an ancillary attachment is issued upon which property is seized, an order of the court dissolving the attachment is a final judgment from which an appeal lies, such judgment being a final determination of the ancillary proceedings.
2. A bond given on suing out a writ of attachment by a copartnership firm, signed and sealed by one of them in the copartnership name, the signing having been authorized by the other by parol or ratified by parol, is a sufficient bond of both partners.

---

---

Jeffreys et al. v. Coleman—Statement of Case.

---

---

Appeal from the Circuit Court for Duval county.

February 7th, 1883, C. R. Jeffreys and T. E. Stribling, partners, commenced suit by summons which was served on the 8th. On the 7th Stribling made an affidavit for procuring an attachment against Coleman's property, and filed a bond signed in the firm name of "Jeffreys & Stribling," and by sureties. A writ of attachment was issued and levied on defendant's property. On the 8th February defendant moved to dissolve the attachment on the ground that the bond was signed in the copartnership name of plaintiffs, and not in their individual names. On the hearing of this motion plaintiff produced the affidavit of Jeffreys, one of the plaintiffs, stating that he had authorized Stribling to sign the firm name to the bond, and that he ratified and confirmed the same. On the 10th May the Judge refused to consider the affidavit of Jeffreys, and made an order dismissing the attachment, whereupon the plaintiffs entered an appeal from this judgment, and the Judge thereupon made an order superseding the judgment of dismissal, upon filing appeal bond, which bond was then executed and approved.

On the next day, May 11, final judgment was duly entered in favor of plaintiffs upon the cause of action stated in the declaration. Afterwards, on the first day of June, plaintiffs obtained a writ of error to the Circuit Court to bring the whole record before this court for review.

The errors alleged are, first, in excluding the affidavit of Jeffreys, and, second, in dissolving the attachment.

There is no allegation of error in the final judgment upon the cause of action.

*John T. & George U. Walker* for Appellants.

*T. A. McDonell* for Appellee.

---

Jeffreys et al. v. Coleman—Opinion of Court.

---

THE CHIEF-JUSTICE delivered the opinion of the court.

There is no error alleged in the entry of the final judgment for damages and costs, and the plaintiffs evidently desire that it should stand.

We have here an appeal from an order dissolving the attachment, treating it as a final judgment upon the attachment proceedings. Is it a final judgment from which appeal will lie?

The statute says if either party shall feel aggrieved by a final judgment, sentence or decree, he may appeal. This suit was commenced by summons, and the writ of attachment was obtained as an auxiliary proceeding for the purpose of securing a lien upon the defendant's property, to satisfy the judgment when obtained. The dissolution of the attachment put an end to that proceeding, but did not affect the progress of the suit upon the cause of action. Nothing further could be done under the attachment proceedings. The judgment dissolving the attachment having extinguished the plaintiffs' lien, the defendant was entitled to the return of the property seized. It was not merely interlocutory; nothing remained to be done to extinguish the lien. That litigation was terminated, and settled all the rights of the parties involved in it. "A decree or order is final, and within the provision allowing an appeal, which is conclusive as to its subject or object." *Baker vs. Lehman*, Wright, Ohio, 522; *Ware vs. Richardson*, 3 Md., 505; *Perkins vs. Sierra Nev., S. M. Co.*, 10 Nev., 405.

It was held in *Harrison vs. Thurston*, 11 Fla., 307, that a refusal to dissolve in a suit commenced by attachment, was not a final judgment from which an appeal would lie, because something remained to be done to put an end to the suit. [It is respectfully submitted that the second head-note to the reported case does not refer to anything

---

---

Jeffreys et al. v. Coleman—Opinion of Court.

---

---

**dec**ided in the opinion of the court, or by the judgment.] **There** is nothing in that case decisive of any question here, **nor** do the cases referred to in the opinion of the court **bear** upon the present question, except so far as they hold **that** a final judgment is one that determines the rights in **issue**.

Our conclusion is that the judgment of the court dismissing the attachment is such a final judgment, determining the rights of parties that an appeal will lie. Without **this**, the plaintiff would be without remedy, however erroneous the judgment might be; and it is clearly the policy of the law that an appeal should not only be effective to correct an error, but also effective to save the rights of parties. It is also clear that an appeal in a case like the present, postponed until after judgment upon the cause of action, would not save the lien of the attachment, though it may be found that the Judge committed an error in dissolving the ancillary writ.

Concluding that the appeal here is effective to remove the record of the judgment dissolving the attachment to this court for review, and that the writ of error is not efficient to bring up the matters involved in the appeal, to conserve the rights of the plaintiff if they are aggrieved, the writ of error must be dismissed, and the cause retained on the appeal.

It remains to be considered whether the bond is sufficient, having been signed and sealed in the partnership name.

The doctrine of the English common law was that a bond signed by one partner in the course of partnership business, without an authority under seal, binds only the partner who signs and seals it, although it is signed and sealed in the name of the firm. The old authorities assert that no prior authority or subsequent ratification, either verbal or by writing without seal, is sufficient to give va-

---

 Jeffreys et al. v. Coleman—Opinion of Court.
 

---

lidity to the instrument as the sealed contract of the parties. The American courts have strongly inclined to repudiate the doctrine in all cases where an express or implied authority or conformation could be justly established, not under seal, whether it be verbal, or in writing, or circumstantial. Story on Partnership, 6th Ed., §§120, 121.

Chancellor Kent, in his Commentaries, Vol. 3, 48, says: "The more recent cases have very considerably relaxed the former strictness on this subject; and while they profess to retain the rule itself, they qualify it exceedingly in order to suit the exigencies of commercial associations. An absent partner may be bound by a deed executed on behalf of the firm by his co-partner, provided there be either a previous parol authority, or a subsequent parol adoption of the act." Skinner vs. Dayton, 19 Johns., 512; Anderson vs. Tompkins, 1 Brock., 462; Cady vs. Shepherd, 11 Pick., 405, 406; Bond vs. Atkin, 6 Watts & Serg., 166; Gram vs. Seton & Bunker, 1 Hall., N. Y., 362; Milton vs. Mosher, 7 Met., Mass., 244; Herbert vs. Hanrick, 16 Ala., 581; Smith vs. Kerr, 3 N. Y., 144; Drumright vs. Philpot, 16 Ga., 424; Swan vs. Stedman, 4 Met., 548; Ely vs. Hair, 16 B. Monroe, 230; Story on Part., § 121, note 2.

In Ball vs. Dunsterville, 4 Term R., 313, it is decided that if A execute a deed for himself and his partner, by the authority of his partner and in his presence, it is a good execution though not sealed but once. Gibson vs. Warden, 14 Wall., 244, 247; Purviance vs. Sutherland, 2 Ohio St., 478. In Kasson vs. The Estate of Brocker, 47 Wis., 79, 85, an appeal bond was signed Kasson & Noyes, as principals in the matter of a claim prosecuted by them; it was held that a bond signed by one partner in the partnership name will bind all the parties consenting to such signature, and will bind their heirs. To the same effect see



---

---

**McClenny v. Hubbard—Statement of Case.**

---

---

**Danforth; Davis & Co. vs. Carter & May, 1 Iowa, 546, 553, which was like the present case, a motion to dissolve an attachment, the bond having been signed in the partnership name.**

The written deposition of Jeffreys that he authorized and ratified the signing of the bond was sufficient to bind him to the act of Stribling, his partner, and the bond was the deed of both partners.

It is therefore considered that the writ of error in this case be dismissed; that the judgment of the court dissolving the attachment was a final judgment from which an appeal would lie, and the judgment dissolving the attachment is reversed with costs.

---

**C. B. McCLENNY, APPELLANT, vs. S. B. HUBBARD, APPELLEE.**

Where there is a conflict of testimony given on a trial before a referee, and his finding is in favor of a party upon the facts, this court will give the same effect to the finding as to the verdict of a jury, especially where such finding is supported by a preponderating number of witnesses who are not impeached.

Appeal from the Circuit Court for Duval county.

Trial before Mr. Wm. B. Young as Referee.

Hubbard sued McClenny in assumpsit for merchandise sold to him in May and June, 1881. Defendant denies the indebtedness. The cause was by consent referred to Wm. B. Young, as referee, who found in favor of plaintiff for the amount claimed, and a motion for a new trial hav-

---

---

McClenny v. Hubbard—Statement of Case.

---

---

ing been overruled, judgment was entered and defendant appealed.

Plaintiff proved the shipment of the articles charged the account to the defendant from time to time at the rate charged, and their value as charged. They were shipped by rail to defendant's address, at Maxville, Fla., where he was building a mill. The goods were ordered by W. G. Merrill on account of defendant, and a bill of each shipment was mailed to defendant at Maxville immediately after shipment.

W. G. Merrill, for plaintiff, testified that he agreed with McClenny to build a mill at Maxville for a certain price, but very soon this contract was abandoned and settled as between his father J. G. Merrill went on with the work by arrangement with defendant. Witness says when McClenny and himself were talking about some belting McClenny told him to go to a certain store and get what he wanted for his mill there. Witness told him they were cheaper than Hubbard's. He said he was not on good terms with Hubbard, and he did not want to go to Hubbard's, but he finally said "you get them anywhere in Jacksonville you can get them cheapest, and if you can get them cheaper than Hubbard's you can get them there and tell him to send the bill with the things and I will send the money." Witness ordered most of the articles in the bill for defendant, and he authorized witness to order them. Witness was at Maxville when McClenny received bills for the goods made out against him and he made no objection to the bills being so made out. The goods were used in the construction of the mill. Nearly, if not quite all the goods, were ordered after I had given up the contract. Very little had been done before that time, which was the first of May.

J. G. Merrill, for plaintiff, testified that McClenny became dissatisfied with W. G. Merrill, and told witness he

---

---

McClenny v. Hubbard—Statement of Case.

---

---

would not have any more to do with him. Witness proposed to quit, and McClenny said no, go on and complete the mill and he would pay for the material that had been used and furnish all additional material required. McClenny told witness that he had authorized W. G. Merrill to buy belting and some other material at Hubbard & Co's. He said he didn't care to deal with Hubbard because there was some unpleasant feeling between them, but that if my son could buy cheaper at Hubbard's he could do so, and he, McClenny, would furnish the money to pay the bills. After witness went to work for McClenny he was told by him to get some things where he could get them cheapest, and got some from Hubbard for Mr. McClenny; they were used in constructing the mill; I directed that they be charged to McClenny. This was from late in April to June.

S. B. Hubbard testified that the goods were shipped from time to time marked to McClenny, and bills made out against McClenny and sent by mail with each shipment. Never had any notice that McClenny was not properly charged with them till the goods were all sent and the mill completed.

W. H. Parker, for plaintiff, testified he was in the employ of Hubbard in the hardware business. About the middle of May, 1881, on Bay street, in Jacksonville, met McClenny with W. G. Merrill, and McClenny asked me when that belting would be here. I replied, in a week, as we had the invoice. This was belting ordered by Merrill for McClenny. He then said to Merrill, why did you not get the belting from Benedict & McConihe. He replied that ours was a better article. The belting arrived and was shipped May 29 to McClenny.

Testified that he made a contract with W. G. Merrill to

---

 McClenny v. Hubbard—Statement of Case.
 

---

build a mill for defendant at Maxville. The contract was —  
 in writing in a book which is lost. Witness was to pay ~~him~~  
 him \$1,300, Merrill to furnish everything except the ma- ~~chinery~~  
 chinery then on hand. This contract was never rescinde-  
 Never authorized Merrill to buy articles on my accou-  
 Told him if you buy anything of Hubbard make your own  
 arrangements with him, I won't have my name on ~~his~~ <sup>is</sup>  
 books. One bill of Hubbard's was handed me by ~~my~~  
 brother, and I told him to take it to Merrill, and say ~~to~~  
 him I have nothing to do with Hubbard's bill. No rec- ~~ol-~~  
 lection of seeing any other until after the work was done,  
 and Merrill was settled with and gone. Then all the bills  
 were sent me and I directed my brother to send them back  
 to Hubbard. Merrill applied for money to pay Hubbard's  
 account. Never asked Merrill if the belting ordered by  
 Hubbard for me had come. Was led by Merrill to believe  
 he ordered the belting from Savannah in his own name.  
 Never told J. G. Merrill I had authorized W. G., his son,  
 to buy at Hubbard's, but told him the other way. My in-  
 structions to W. G. were, if he bought from B. & McCon-  
 ihe to have the bills sent to me, if he bought from Hub-  
 bard to make his own arrangements. Never authorized J.  
 G. or W. G. Merrill to buy anything from Hubbard for my  
 account. My first knowledge that Hubbard had charged  
 these articles to me was after Merrill had been paid and  
 gone away when the bunch of bills came from Hubbard's.  
 Understood the materials were being furnished on account  
 of Merrill, he was to furnish everything except the machin-  
 ery on the ground. *Cross-examination.* I visited the mill  
 during its construction about three times a week. Merrill  
 purchased things of B. & McConihe and had them charged  
 to me, and I paid them. Don't recollect whether the Hub-  
 bard bill handed me by my brother was made out against  
 me. I received it very soon after Merrill commenced work

---



---

 McClenny v. Hubbard—Opinion of Court.
 

---



---

the mill. About 60 days after the mill was completed Merrill paid and left, he asked me for half the money of Hubbard's bill. I refused, because under the contract I was under no obligation, and he had been overpaid. On D. McClenny, for defendant, testified. I was agent C. B. McClenny, superintending his business at the mill. Defendant handed me back a bill of Hubbard & Co., and I took it to Merrill. I said to Merrill that C. B. McClenny was angry, as he does not deal with Hubbard. He replied he told me not to get them there, but I bought them because I could get them cheapest. Except one bill of Hubbard's, all the rest came in a bunch some 30 days after the completion of the mill. The one bill came by mail, and was made out against "C. B. McClenny, purchased by Merrill," as I recollect.

The foregoing are the salient portions of the testimony which the referee found in favor of plaintiff.

*For Earl Hartridge for Appellant.*

*For William & Daniel for Appellee.*

THE CHIEF-JUSTICE delivered the opinion of the court.

The only question in this case is as to the sufficiency of the testimony to charge defendant with the goods ordered of the Merrills. The Merrills, father and son, testify that defendant said he did not want to have dealings with Hubbard, but told them to get things where they could be got cheapest and he would pay the bill. McClenny denies the testimony of both on this subject, and says he told them he would pay no bill at Hubbard's, but that he would pay for materials for building his mill which they purchased at another store. The goods, except \$10 worth, delivered to the Merrills in January, were shipped by Hubbard to McClenny's

---

---

McClenny v. Hubbard—Opinion of Court.

---

---

address, by rail at the place where the Merrills were at work building the mill, and where McClenny had a brother superintending his business. The goods so addressed were put into the mill in its construction, as were the articles delivered at the store to the Merrills. Bills were mailed to McClenny's address at the times of shipment, made out against McClenny "by Merrill." One of these bills was received by defendant, as he himself testifies, "very soon after Merrill commenced operations on the mill." Yet with this notice that Hubbard was sending goods addressed to him for his mill, ordered by Merrill, the account being charged against McClenny, he merely sends the bill to Merrill and gave Hubbard no notice that Merrill was not authorized to order the goods. Defendant was at the mill two or three times a week, at least, while the work was going on, and his brother, his agent, was there all the time, receiving the goods addressed to defendant, not to Merrill, and they were used in the construction of defendant's mill. These circumstances strengthen the testimony of the Merrills that defendant was to pay for goods ordered by them for the mill! Though it may be true that by the contract with W. G. Merrill the latter was to furnish the articles, yet the defendant says he authorized the purchase from another party, by Merrill, on his account and paid the bills. Having notice that Merrill was purchasing in his name from Hubbard also, it was his own fault if he overpaid Merrill. But both the Merrills testify that defendant authorized them to buy where they could get goods cheapest and he would pay the bills. They also both testify that the original contract for building the mill was abandoned by both W. G. Merrill and defendant at the instance of defendant.

Taking the testimony altogether we think a jury would not hesitate to hold the defendant liable unless there was

---

---

The State ex rel. v. Cooper—Syllabus.

---

---

something in the manner of the witnesses for plaintiff in the giving of their testimony to discredit them. Nothing of the kind appears in this record. The referee having the witnesses before him was well qualified to judge of their credibility, and the same weight should be given to his finding of facts as would be accorded to the judgment of a jury. *Vansteenburg vs. Hoffman*, 15 Barb., 28; *Wooden vs. Foster*, 16 Barb., 146; *Sinclair vs. Tallmadge*, 35 Barb., 602.

Again, if defendant did not expect to pay the bills contracted with Hubbard, but Merrill was to pay them, we can conceive no good reason why defendant should concern himself with or object to Merrill buying of Hubbard, or otherwise interfere, if the goods were suitable and could be bought "cheaper" than elsewhere.

We find no error in the finding of the referee, and the judgment is affirmed.

---

THE STATE EX REL. YELVINGTON, APPELLANT, VS. M. R. COOPER, COUNTY JUDGE, APPELLEE.

1. The statute regulating appeals from orders and decrees of the County Court in Probate proceedings contemplates that the appeal shall be entered in writing by the party appealing. A mere verbal request made to the County Judge to enter an appeal in his minutes, furnishes no ground for a mandamus to compel the Judge to enter the appeal, if he neglects to comply with such request.
2. The County Judge may, in a spirit of accommodation, enter an appeal in writing at the request of a party, but it is not a duty enjoined by law. A judicial officer ought not to be made responsible for the sufficiency of pleadings and proceedings of parties.

---

The State ex rel. v. Cooper—Opinion of Court.

---

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

*A. R. Meek* and *B. F. Roberts* for Appellants.

*C. M. Cooper* and *Calhoun & Calhoun* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

Relator applied to the Circuit Judge of the Fourth Circuit for a mandamus to compel the County Judge to make an entry of said appeal in the said final order, thereby reversing the decree of said County Judge refusing to set aside probate of a will on relator's application.

Relator alleges that on the day of the announcement of the decree, and in open court "his attorney requested said Judge sitting as aforesaid to make an entry of the file of his appeal in the docket of his court, whereupon the said Judge, sitting as aforesaid, informed and announced said petitioner and his said attorney that he would make an entry of said appeal in the said final order, thereby making such appeal part of the record of said cause." That he had good reason to believe that his appeal was so entered but after the expiration of the time for taking an appeal he ascertained that his appeal was not entered and that the Judge refuses to enter the same.

An alternative writ was issued and the County Judge makes return that he does not refuse to enter an appeal on behalf of relator because neither the said Yelvington nor his attorney requested him to enter an appeal as alleged and he did not announce that he would enter such appeal.

He further says he was under no obligation in law to enter petitioner's appeal in said probate proceedings, but was the duty of said petitioner to file with the County Judge his entry of appeal.



---

---

The State ex rel. v. Cooper—Opinion of Court.

---

---

Relator took issue upon said return and the Circuit Court refused to grant a peremptory writ and dismissed the proceedings upon the ground that the return traverses the material allegations of the petitioner. From this judgment relator appeals.

Whether the order of the Circuit Court dismissing the writ upon the ground stated, to wit: that the return negatived the material allegations of the alternative writ, was regular or not, is immaterial, provided the allegations, if proved, are insufficient to sustain the proceeding. We think if the County Judge, who is the clerk of his own court, had refused to perform a ministerial duty, such as the filing of a paper or making an entry in his minutes or any similar act required by law, a mandamus would lie; and an issue of fact as to the thing required, (to wit: whether the paper was placed in his possession to be filed and he was requested and refused to do what the law required him to do,) is made to the return, the court should inquire further and determine the facts according to the practice of the courts in such cases. There is no judicial discretion or judgment of the County Judge sought to be controlled in such a proceeding.

But suppose the relator's allegations are true, do they entitle him to the writ? The act of 1868, (ch. 1627, McC. Dig., 328, §21,) regulating appeals from probate decrees provides that if an aggrieved party desires to appeal he may within twenty days "enter with the Judge of said court his appeal to the Circuit Court." By the next section he "shall cause a *copy* of the entry of appeal, which *he enters* with the Judge," to be served on the appellee within twenty days after its entry. There is here no express duty of the County Judge, unless it be to file a paper that may be left with him. To enter an appeal with the Judge, and to serve a "copy of the entry of appeal

---

---

The State ex rel. v. Cooper—Opinion of Court.

---

---

which he enters with the Judge,” means something more than a conversation held with the Judge in which he intends the Judge shall understand that he desires to appeal. Nothing is required of the Judge but to receive and file the entry of appeal, which “entry” is the act of the party and not of the Judge. It is not the Judge but the party who enters an appeal, and it is the party who must serve a copy of the entry of appeal which he enters with the Judge, on the appellee. If the appeal sought to be entered is a mere verbal statement to the Judge that the party appeals, it is difficult to conceive how a copy of his verbal *entry* can be served.

There is no consistent meaning of this statute but that the entry of appeal must be in writing and not a mere verbal notice which may be misunderstood or forgotten, in order to charge the Judge with a neglect of duty if he fails to make return to the appeal. A most familiar rule in cases of mandamus is that an officer cannot be proceeded against unless he has neglected or violated some duty enjoined or necessarily implied by the law regulating his duties. The act in question neither by express words or by implication requires the County Judge to make entry in any book of the taking of an appeal within twenty days. The appeal is complete when it is entered by the party. We see, therefore, no ground for charging him with neglect or refusal to do any act required of him by law.

Relator’s counsel refer to the taking of appeals in the Circuit Court as regulated by the statute and the rules of court and seem to think an appeal in the Probate Court may be controlled by them. The statute regulating appeals from judgments of the Circuit Court says if the appeal be applied for in term time, “the application shall be made in open court and so stated by the clerk upon the record,” and the rules prescribe a proper form of the entry to be made

---

---

Avery et al. v. City of Pensacola et al.—Syllabus.

---

---

There is no such direction in the statute regulating the duties of the County Judge.

In what has been said above we are not to be understood that if an entry of appeal is made by the County Judge at the request of a party, such entry is not regular or effective. The Judge may, if he sees fit, draw up an entry of appeal for a party in a spirit of accommodation, but it is not a prescribed duty, and it is better that the Judge shall not be held responsible for the form or sufficiency of the pleadings and proceedings of parties litigating before him.

For the reasons herein stated the judgment of the Circuit Court is affirmed.

---

A. L. AVERY ET AL., APPELLANTS, VS. THE CITY OF PENSACOLA ET AL., APPELLEES.

Appeal from the Circuit Court for Escambia county.

*John C. Avery* for Appellants.

*W. A. Blount* for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The decision in the case of the City of Jacksonville vs. Arthur D. Basnett *et al.* (*supra*, p. 525, and 19 Fla., 664,) cover the principal question raised in this case. The question is the constitutionality of chapter 3477, Laws.

There was something said in this case about the rights of parties who had purchased property since the assessment was made. We do not understand the bill to make that case.

---



---

Sullivan v. Walton—Syllabus.

---



---

The decree, therefore, in this case must be, that the order of the Chancellor denying the injunction is affirmed, and that the case be remanded with directions to dismiss the bill. Whether the equitable remedy here sought would lie in the event there was any right, we deem it unnecessary to decide, as the judgment there is the same in either event.

---

MARTIN H. SULLIVAN, APPELLANT, VS. JOHN B. WALTON,  
TAX COLLECTOR OF THE CITY OF PENSACOLA, APPELLEE.

1. Under the law of municipal corporations in this State they are authorized up a vote of the electors to issue bonds to meet municipal expenses or for any municipal purpose. The statutes require that the amount to be issued, as well as the issuing of such bonds, shall be thus submitted to the electors, and in the event a required majority is given makes it the duty of the City Council to assess and collect such taxes from the citizens as are necessary for the payment of the interest as well as for the final payment of the bonds. The tax so directed to be levied is not a "special tax," within the meaning of chapter 3313, Laws of 1881.
2. There are outstanding bonds of a city which the city desires to compromise by an issue of new bonds to take up the outstanding bonds. The question of the issue of the bonds and the amount to be issued is submitted to the qualified electors of the city; the required majority is given for the issue and the amount to be issued; the statute in this event made it lawful for the bonds to be issued: *Held*, That the recital by the Mayor and Council in the proclamation submitting these questions that they were assured that the old bonds would be surrendered was no condition under the law for the issuing of the new bonds, and that the new bonds thus issued, if within the amount authorized and otherwise legal in the nature of their obligation under the statute, were valid and binding obligations upon the city.

---

---

Sullivan v. Walton—Opinion of Court.

---

---

3. In such case the fact that the courts of the United States are entering jurisdiction to enforce the old bonds against the city does not prevent the city authorities from levying a tax to pay the new bonds to the extent to which an exchange has been made.

Appeal from the Circuit Court for Escambia county.

The facts of the case are stated in the opinion.

S. *R. Mallory* for Appellant.

W. *A. Blount* for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The cases of Basnett and others against the City of Jacksonville, one of which is reported in 19 Fla., 664, and the other in the same report as that containing this case, (p. 525,) dispose of all of the questions raised in this case as to the constitutionality of chapter 3477, Laws, under which the tax for general municipal purposes was here assessed and levied by the City of Pensacola. The only other tax to which objection is urged here by appellant, is the tax assessed and levied to pay interest upon new bonds of the city, issued in lieu of old bonds.

Neither of the parties to this appeal give us a statement of the case, and we are therefore to some extent embarrassed in the statement of it. There seems to have been an agreement to refund the bonded debt of the city made prior to the 8th of December, 1882, but we cannot find it in this record; so also an ordinance was passed by the Board of Aldermen of the City, entitled an ordinance to levy and collect a special tax to pay the interest upon the bonded debt of the City of Pensacola, under the agreement for refunding, approved December 8, 1882. Chapter 3313 of the Laws, which was approved March 3, 1881, provided

---

---

Sullivan v. Walton—Opinion of Court.

---

---

“that from and after the passage of this act it shall be lawful for any City or Town Council to pass any ordinance or resolution imposing a special tax for any purpose without first giving notice by publication in a newspaper for least thirty days, or by posting for thirty days in one or more public places in such city or town.” It is admitted that the notice here required was given of the first ordinance passed in reference to this debt. This ordinance fixed the tax to be levied at one per cent. upon the real and personal property of the city. In March, 1883, this ordinance was amended by reducing the tax to five mills instead of one cent. The point is now made that not only must there have been notice of the original ordinance, to levy and collect a tax of one per cent., but that there should have been notice also of the amending ordinance reducing it. Our view of this matter is that this was no “special tax, within the meaning of the statute.

Sections 18 and 19 of chapter 1688, Laws, as amended by sections 6 and 7 of chapter 3024, Laws, and section 18 of chapter 1688, Laws, regulated the matter of the issue of bonds by cities, and the assessing and collecting of taxes for the payment of the principal and interest on the same. Section 18, as amended by section 6, authorizes the City Council, with the approval of two-thirds of the registered voters of the city actually voting, to issue bonds for various purposes, among which, we think, is included the purpose for which the bonds here were authorized, viz: a compromise of an existing bonded debt, and an issue of new bonds for a smaller amount of principal. What the interest of the old bonds was, we cannot ascertain from the record. Section 19 as amended by section 7, requires that the amount to be issued, as well as the issuing of such bonds, shall be submitted to the qualified electors of the city in such manner and after such public notice as may

---

---

Sullivan v. Walton—Opinion of Court.

---

---

deemed necessary by the City Council. Section 20 of chapter 1688 makes it the duty of the City Council to assess and collect such taxes from the citizens and upon the property within the city, as is necessary for the payment of the interest upon, as well as the final payment of said bond, with a proviso that all property shall be taxed upon the principle established by State taxation.

We have here legislation authorizing the creation of an indebtedness by the corporation, and the Legislature in express terms fixes the amount to be levied, that is, such a sum as is necessary to pay interest and principal of the bonds, both of which are ascertainable by reference to the municipal records. The citizen knows the amount already. He has voted upon the question. This is not a special tax "imposed by an ordinance or resolution of a city or town council." It is an annual tax, imposed under the statute, to meet an acknowledged and fixed indebtedness of the city, as much so as any other expense which the annual taxes are expected to meet. A special tax, within the meaning of this statute, is for a sum not embraced in the usual annual expenses, and incurred by the city under its general powers, the purpose of the Legislature being to require the municipality to keep the people informed in the matter of the imposition of taxes to pay particular expenses not belonging to the usual annual budget of the city. An annual or other special notice is not requisite to the validity of an ordinance providing for the collection of a tax to pay the interest and principal of the bonded debt of the city.

Objection is urged to the tax because all the holders of the old bonds were to be included in the compromise under the proclamation of the Mayor, and if they are not included, there is no authority in the city to tax for the new bonds. The notice given or proclamation made, does not, in terms,

---

---

Sullivan v. Walton—Opinion of Court.

---

---

recite as a condition to issuing the new bonds that the holders of all the old bonds shall accept the new bonds. The question of issuing new bonds was submitted to the people under a proclamation of the Mayor, in which the Mayor and "Board of Aldermen" recite that "the Board has satisfactory assurances that the holders of bonds and coupons of the City of Pensacola," issued under an act approved January 3d, 1853, as well as the holders of judgments founded on said bonds, are willing to accept in discharge and satisfaction thereof new bonds upon the following terms. Then follows the *conditions* or "terms" upon which the exchange is to be made. The new bond was to be issued at the rate of forty cents for each dollar of the old bonds, coupons and judgment with accrued interest. They were to be payable in thirty years at rates of interest named, and the time and place of payment of bonds and coupons were to be fixed by the Mayor. That the issue was not to exceed \$280,000, and that a special tax shall be annually levied, pursuant to the provisions of the second section of the act of the Legislature of January 3, 1853, to pay the coupons, the coupons to be receivable in the payment of such tax, as well as all other city taxes, fines, penalties, forfeitures and licenses. It is thus seen that the recital constituted no part of the "terms" or condition upon which the new issue is to be made, the recital being merely that the Board were assured that the holders of the old issue of bonds would accept such bonds as to the issue of which the electors of the city were to express their willingness or dissent.

These proceedings to authorize new bonds, were had under sections 18 and 19 of chapter 1688, Laws, amended by sections 6 and 7 of chapter 3024, Laws; and section 20 of chapter 1688. These sections contain the conditions upon which bonds are to be issued. The questions to be



---

---

Sullivan v. Walton—Opinion of Court.

---

---

submitted to the qualified voters are the issue of the bonds, the amount to be issued, and the law is that "should two-thirds of the votes actually cast by said electors be in favor of issuing the bonds and the amount proposed to be issued, then and in that event it shall be lawful for them to be issued, otherwise not." How the tax was to be assessed, what the tax was, whether special or otherwise, whether it was under one law or another, and whether all the holders of the debt, for the retirement of which the new bonds were to be issued, were or were not willing to make the exchange, were not questions to be submitted to the electors. These things were controlled by the general law of municipal corporations, and the statutory power of the Mayor and City Council. As a matter of course, the bond must have been for a municipal purpose or expense. The matter of the assessment and collection of the tax was, by the law, section 20, ch. 1688, Laws, left to the council after the bonds were authorized. The electors were not required to vote as to that.

The issue of new bonds, we think, is legal. As to them, the Courts of the United States are not entertaining jurisdiction, and so long as the council keeps within the terms of section 20, chapter 1688, Laws, and the other statutes, in the assessing and collecting the tax, the courts should not interfere. Whether, therefore, a court of equity has jurisdiction or not, the order of the Circuit Court is right.

Looking at the whole matter, we doubt whether one citizen tax-payer alone, in a suit to which neither the city or its bondholders are parties, and to which only himself and an officer of the city are parties, can be heard to assail and set aside a compromise of a bonded indebtedness of the city by which the debt is to be reduced hundreds of thousands of dollars.

# SUPREME COURT.

---

Carter's Administrators v. Carter et al.—Syllabus.

---

The order denying the injunction is affirmed, and the case will be remanded for further proceedings.

---

CARTER'S ADMINISTRATORS, APPELLANTS, VS. CARTER ET AL.  
APPELLEES.

1. Money and evidences of debt are personal property and may be included in the selection of property exempt from any process of law, or from administration of assets to satisfy debts.
2. A waiver of any benefit of exemption laws, or an agreement that all the debtor's property shall be subject to levy and sale, contained in a promissory note, is inoperative as against the policy of the exemption laws. Otherwise as to a mortgage or pledge of specific property.
3. When property which may be claimed as exempt from the satisfaction of debts has been sold or converted into funds by administrators, the heirs entitled may claim the value out of funds in the hands of the administrators.
4. Heirs are entitled to the same right of exemption of property that the ancestor had before his death.
5. An allowance by the Probate Court out of personal property for the temporary support of the heirs of the intestate must be accounted as part of the amount of personal property claimed by the heirs as exempt from the payment of debts.

Appeal from the Circuit Court for Jackson county.

The facts of the case are stated in the opinion.

*Benjamin S. Liddon* for Appellants.

*J. F. McClellan* and *F. B. Carter* for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

---

---

Carter's Administrators v. Carter et al.—Opinion of Court.

---

---

This is a bill filed in behalf of the children and heirs of F. M. G. Carter, who died in January, 1880, praying that the administrators set apart out of the personal estate, property and money to the amount of one thousand dollars as exempt from administration and from liability to pay the debts of the deceased.

The personal estate consisted of certain chattel property appraised at \$634.34; notes of Tony Horne secured by mortgage on land, on which there was due in 1881 about \$1,968; county script, not appraised, nominal value \$87; and sundry notes and accounts due to deceased, amount not stated. The administrators took possession of all the property, and under the order of the County Court personal property of the value of two hundred dollars was set apart to the children "for one year's support." The residue of the property appraised, other than evidences of debt, was sold by the administrators for the sum of \$469.23.

The notes and mortgage against Horne were foreclosed and the land bid off by the administrators in behalf of the estate, and this land was afterwards sold by them as assets of the estate and the proceeds so treated.

The bill was demurred to on the ground that notes, script, &c., were not such property as could be exempted under the Constitution from "forced sale," and therefore could not enter into the amount of personal property which can be claimed by the heirs to be exempt from administration as assets. The court overruled the demurrer and defendants answered that they bought in the property on the Horne mortgage for the nominal sum of \$500, and that the mortgage covered only an undivided half of a mill site of four acres, the other half belonging to the estate. There was no other security for the money due on the note and mortgage and Horne is utterly insolvent. That they bought in the undivided half covered by the mortgage for the benefit of

---

Carter's Administrators v. Carter et al.—Opinion of Court.

---

the estate, and the same has since been sold under the order of the County Judge and only \$240 realized therefor, out of which they claim the costs of foreclosure should be paid, exceeding eighty dollars. There has been realized on notes due the estate only \$32.50. The Washington county script at 40 cents on the dollar was worth \$34.36. They further answer that there is an outstanding unpaid promissory note given by deceased in 1878 on which is due \$318.18, and that in the body of the note it was agreed and stipulated by deceased that "should judgment be obtained against me on this note I hereby agree that all my real and personal estate and effects shall be subject to levy and sale in execution thereof to an amount sufficient to satisfy said judgment, hereby waiving and relinquishing all benefit of any law exempting such estate and effects or any part thereof from such levy and sale." And defendants claim that this note should be paid out of the property without regard to the exemption law and submit that the waiver of the exemption contained in the note in law subjects all the property to its payment.

There was a stipulation filed and the cause was set down for hearing on bill, answer (original and amended) and replication. The court suggested that before making a decree he wanted information not to be found in the papers. Thereupon counsel for the respective parties subscribed and submitted to the court a statement of the expenditures made in administering the estate, of claims paid and of claims not satisfied, not showing, however, what claims not paid are legally chargeable against the assets of the estate.

They annex a statement of assets as follows:

Rent, mill and farm, 1880 .....	\$308.00
Balance on orange grove, Calhoun County .....	349.68
Rent, mill and farm, 1881 .....	601.00
Rent, mill and farm, 1882 .....	175.00
Sale lands .....	803.08

---



---

Carter's Administrators v. Carter et al.—Opinion of Court.

---



---

Rent of Turner Horne .....	25.00
Total .....	\$2,261.77

## SCHEDULE OF PERSONAL PROPERTY.

Sales of personal property after deducting \$200, year's support shown by answer .....	469.23
Amount Dekle note .....	21.75
Washington county script .....	34.56
Amount Tony Horne mortgage .....	500.00
Total .....	\$1,025.54

Total .....\$3,287.31

From the allegation of the pleadings and this statement of the assets the Chancellor concluded that there was enough estate, real and personal, to pay the note in which the exemption was waived and the expenses of administration after allowing the \$1,000 exemption, and gave a decree for complainants that they recover of the defendants one thousand dollars with interest from the day of the commencement of this suit and costs.

Defendants appealed from this decree.

The *first* error assigned is the overruling of the demurrer, and the question is, whether the heirs may claim as exempted from liability to payment of debts the notes and script and their proceeds as well as tangible goods and chattels. We understand that the property embraced in the inventory was household goods, farm, implements and the like.

It has therefore been held that property which is exempt from seizure for the payment of debts is also exempt from liability and is not assets in the hands of an administrator subject to administration. *Baker vs. State*, 17 Fla., 406 ; *Wilson Ex. vs. Fridenburg*, 19 Fla., 461.

Article X, section 1, of our Constitution exempts from forced sale under any process of law one thousand dollars worth of personal property.

---



---

Carter's Administrators v. Carter et al.—Opinion of Court.

---



---

Evidences of debt and money due and to become due are property liable to taxation and to the process of garnishment and other legal and equitable process for the collection of debts, and are therefore regarded as personal property.

The Constitution of Arkansas contained homestead and exemption clauses similar to our own, and the Supreme Court of that State in Probst vs. Scott, 31 Ark., 652, held that choses in action were personal property and might be claimed as exempt from garnishment within the spirit of the constitutional exemption. Exemption laws are to be liberally construed in favor of their beneficent purposes.

Under similar clauses in the exemption laws of North Carolina choses in action were held to be subject to selections by the owner as property exempt from liability for debts. Frost vs. Naylor, 68 N. C., 325.

And money due from an insurance company may be claimed as exempt property. Strouse vs. Becker, 44 Pa. St., 206; Houghton vs. Lee, 50 Cal., 101. Money in bank may be selected as exempt from garnishment under a law exempting from execution or attachment a certain amount of property. Fanning vs. First Nat. Bank, 76 Ill., 53; Jones vs. Tracy, 75 Pa. St., 417.

The demurrer was properly overruled, not only because the personal chattels were exempt, but because an exemption may be claimed in money and choses in action as well as in other property. The object of the exemption clauses in the Constitution is to secure the debtor and his family against absolute poverty, and in case of his death to afford his heirs a limited amount for their support.

The *second* ground of error relates to an opinion filed by the Chancellor and doubtless shows one ground upon which the final decree is based, and may be considered in dealing with the decree.

---

---

Carter's Administrators v. Carter et al.—Opinion of Court.

---

---

The *third* ground is that the court erred in making the "waiver note," i. e., the note in which the exemption is waived, a preferred claim against the estate as against other debts.

We cannot understand from the record what was the condition of the estate, whether solvent or insolvent. There has been no final settlement of the administration. There is nothing showing what legitimate claims have been presented and allowed against the estate. The long accounts or "statements" filed are not clear on the subject. It must be said, however, that we do not think the "waiver note" has any preference to be paid out of assets not exempt. That note, if a subsisting claim against the estate, is to be paid in like manner as other debts, and if the assets of the estate are not sufficient to pay the debts in full it must be paid *pro rata* with other claims out of assets available and applicable to the payment of debts generally.

This note is not a *specific lien* on exempt property to any greater extent than it is upon the whole property.

We inquire then whether an agreement of this kind to waive all benefit and right of exemption is valid in view of the policy of the exemption laws.

A mortgage of personal effects, to be effectual for any purpose, must be recorded or the possession of the property delivered to the mortgagee. Act of 1828.

Upon the question of waiving the right of exemption of personal property from levy and sale for the satisfaction of debts, Mr. Thompson, in his work on Homestead and Exemption, says the authorities are divided. He cites, however, the decision of Pennsylvania only to sustain the position that a waiver contained in a note like that under consideration is effectual. Several cases are referred to, but *Case vs. Dunmore*, 23 Pa. St., 94, is a leading case and gives the reasoning upon which they have established the rule.

---

---

Carter's Administrators v. Carter et al.—Opinion of Court.

---

---

Premising that the exemption of goods is a personal privilege which may be waived by the debtor by omitting to claim it at the proper time, the court says: "But, where at the time of contracting the debt he agrees to waive the benefit of the exemption, and this forms the ground of the credit given to him, the injustice of permitting him to violate his contract and thus to defraud his creditor is too palpable to need illustration or to require the aid of precedents to discountenance it. Notwithstanding the benevolent provisions of the statute, in favor of unfortunate and thoughtless debtors, it was far from the intention of the Legislature to deprive the free citizens of the State of the right, upon due deliberation, to make their own contracts in their own way, in regard to securing the payment of debts honestly due. Creditors are still recognized as having some rights; and it is not the intention of the Legislature to destroy them by impairing the obligation of contracts. It frequently happens that the creditor is more in need of public sympathy than the debtor. When a poor man is unjustly kept out of money due to him, the distress arising from the want of it is often greater than that caused to the other party by its collection. If the suffering was but equal, it is plain that one man should not suffer for the follies or misfortunes of another. Every one should bear his own burden. The statute which exempts debtors from the operation of this principle did not take away from them the right to waive the privilege thus conferred, whenever their consciences or their necessities prompted the waiver."

This rule was afterwards regretted by the Pennsylvania court in a later cause where Judge Woodward said: "Perhaps it would have been well if the court had set out by denying the capacity of the debtor to waive the statutory exemption in favor of *any* creditor. It might have been urged in support of such a view that the Legislature in—



---

*Carter's Administrators v. Carter et al.—Opinion of Court.*

---

tended a benefit to the family of the debtor rather than to the debtor himself; and that his caprice or will, tempted as they might be by the creditor, should not defeat the legislative benefaction in favor of those who were dependent upon him." *Shelly's Appeal*, 36 Pa. St., 373, 380.

The doctrine of the Pennsylvania courts is not favored in other States so far as we have been able to learn. In Alabama, a stipulation contained in a note whereby the maker waives all right to exemption is recognized in *Brown vs. Leith*, 30 Ala., 313, but an examination of the code of that State shows that such waiver is expressly authorized by it; and it is moreover held by the court that under the law of that State the right to claim an exemption is a privilege personal to the debtor and is not transmitted but dies with him.

In New York and other States it has been uniformly held that such waiver was void, on the ground that the policy of the law was violated.

*New York*: "The statutes which allow a debtor, being a householder and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of prime necessity, to a limited amount, are based upon views of policy and humanity which would be frustrated if an agreement like that contained in these notes, entered into in connection with the principal contract, could be sustained. A few words contained in any note or obligation would operate to change the law between those parties, and so far disappoint the intention of the Legislature. If effect shall be given to such provisions, it is likely that they will be generally inserted in obligations for small demands, and in that way the policy of the law will be completely overthrown. Every honest man who contracts a debt expects to pay it, and he believes he will be able to do so without having his property sold on

---

Carter's Administrators v. Carter et al.—Opinion of Court.

---

execution. No one worthy to be trusted would, therefore, be apt to object to a clause subjecting all his property to levy on execution in case of non-payment. It was against the consequences of this over-confidence, and the remedies of men to make contracts which may deprive them and their families of articles indispensable to their comfort, that the Legislature has undertaken to interpose. \* \* \* Before the passage of the exemption laws, contracts for the payment of money at a future time involved the consequence that all the debtor's property, without exception, might be taken on execution in case of default. By the statutes exempting certain property the Legislature, in effect, determined that it was expedient to allow contracts entailing such results; and this was done by providing that property of limited value should not be taken. Parties cannot now stipulate that their contracts shall have the same effect as under the former law, for that would be hostile to the policy thus established." *Kneetle vs. Newcomb*, 22 N. Y., 250.

*Kentucky*: "No one in this State is entitled to the benefit of the exemption laws but a housekeeper with a family, and the Legislature certainly intended by the enactment of such laws to provide more for the dependent family of the debtor than the debtor himself. Every honest man has a desire to fulfill all his obligations, and such are always willing to comply with the demands of a creditor by giving the latter any assurance he may exact as an evidence of his intention to pay his debt. The law in its wisdom, for the protection of the poor and needy, has said that certain property shall not be liable for debt, not so much to relieve the debtor as to protect his family against such improvident acts on his part as would reduce them to want. Such is the policy of the law; and their contract was made, not only in disregard of this policy, but to annul the law itself,

---

---

**Carter's Administrators v. Carter et al.—Opinion of Court.**

---

---

so far as it affected the debt sought to be recovered. If such a contract is upheld, the exemption law of the State would be virtually obsolete, and the destitute deprived of all claim they have to its beneficent provisions. \* \* \*

The right to plead the statute of limitations is a personal privilege; but will it be insisted that an agreement or promise never to plead the statute is binding? If so, the grocer and merchant, and all others engaged in the business affairs of life, would only have to agree with those who promise to pay, verbally or in writing, that the statute of limitations should never be relied on, or the claim to exempted property asserted, in order to render nugatory these wholesome laws, enacted for the peace and welfare of society and in accord with an enlightened public policy. A contract fraught with such consequences to the family of the debtor is totally at variance with public policy, and therefore void." *Moxley vs. Ragan*, 10 Bush, 158.

*Iowa*: "That the citizen or debtor may mortgage the identical property for the payment of the debt, does not at all conflict with the idea that he cannot waive the exemption of the statute in his contract of indebtedment, because the statute itself has provided for the execution of valid mortgages, without limit as to the property mortgaged. In the case of a judgment creditor applying to the court or its officer for an execution, the court, by its clerk, following the language of the law, says to him, 'You may have the execution, but no exempt property shall be sold under it.' The creditor, however, says to the court, 'I will take your execution, but the debtor and myself have made a law for this case which will control your writ, and make it do what the law has declared it shall not do.' No court will permit parties thus to control its process, so as to defeat the statute or render nugatory its most beneficent provisions. Without pursuing the discussion of the subject fur-

---



---

Carter's Administrators v. Carter et al.—Opinion of Court.

---



---

ther in the opinion, we are agreed in the conclusion that ~~\_\_\_\_\_~~ person contracting a debt cannot, by a contemporaneous ~~\_\_\_\_\_~~ and simple waiver of benefit of the exemption laws, entitle the creditor, in case of failure to pay, to levy his execution, against defendant's objection, upon exempt property ~~\_\_\_\_\_~~. Such an agreement is contrary to public policy, and will not be enforced." *Curtis vs. O'Brien*, 20 Iowa, 376.

*Illinois*: In the case of *Recht vs. Kelly*, 82 Ill., 147, a note had been given expressly waiving the benefit of ~~\_\_\_\_\_~~ all laws exempting real or personal property from levy and sale. The court says: "The exemption created by ~~\_\_\_\_\_~~ the statute is as much for the benefit of the family of ~~\_\_\_\_\_~~ the debtor as for himself, and for that reason he cannot, by ~~\_\_\_\_\_~~ an executory contract, waive the provisions made by law ~~\_\_\_\_\_~~ for their support and maintenance. Such contracts contravene the policy of the law, and hence are inoperative and void. The owner may, if he chooses, sell or otherwise dispose of any property he may have, however much his family may need it, but the law will not aid him in that regard, nor permit him to contract in advance that his creditor may use the process of the courts to deprive his family of its benefit and use, when an exemption has been created in their favor. Laws enacted from considerations of public concern, and to subserve the general welfare, cannot be abrogated by mere private agreement." And see *Phelps vs. Phelps*, 72 Ill., 545.

*North Carolina*: A similar waiver at the foot of a promissory note under seal was attempted to be enforced in *Branch vs. Tomlinson*, 77 N. C., 8, and the court uses this language: "It may be assumed that the defendant, as he could sell the exempted property at any time or mortgage it, could waive his right at the time of the levy, and that a sale then made by the sheriff would pass the absolute title to the purchaser; but an agreement beforehand to do so,

---

---

Carter's Administrators v. Carter et al.—Opinion of Court.

---

---

being merely an executory agreement, in no way affects the title which remains in the defendant until a sale, nor does it prevent him from disregarding his contract if he chooses to do so, and leave the plaintiff's to their action for damages. \* \* There is no description of property, no agreement to sell or make title to anything, so that specific performance is out of the case. The agreement is to waive a right in contravention of State policy, which agreement this court cannot undertake to enforce."

*Louisiana*: In *Levicks vs. Walker*, 15 La., 245, a stipulation in a contract waiving any relief from appraisement or valuation laws was held to be void.

We have been unable to find in reports, text books or digests, that it has been held anywhere except in *Pennsylvania* that a written agreement, contained in a note, to waive the right to claim an exemption of personal property from levy and sale to satisfy a judgment rendered on the note, has been sustained. And even in that State the court has expressed regret that a contract of that kind had ever been sustained and that such rule had become established as the law by the repetition of a bad precedent. True, a man may sell his personal property, or may pledge or mortgage it, but in that case the property sold or pledged is designated and identified and a special interest is created in favor of a creditor in the particular article pledged or mortgaged, and in no State is this power of the owner of personalty denied. The object of exemption laws is to protect people of limited means and their families in the enjoyment of so much property as may be necessary to prevent absolute pauperism and want, and against the consequence of ill advised promises which their lack of judgment and discretion may have led them to make, or which they may have been induced to enter into by the persuasion of others.

In this country especially where there happen to be many

---

---

Carter's Administrators v. Carter et al.—Opinion of Court.

---

---

illiterate and unsophisticated people it would be mischievous to encourage such agreement in which by the mere scratch of a pen the whole policy of the exemption laws would become nugatory. Such people, without reference to "race, color or previous condition," are and ought everywhere to be the wards of the State and to be protected accordingly.

When a man executes a mortgage or bill or sale upon certain specified property, the very nature of the transaction implies the exercise of discretion and the contemplation of inevitable consequences. Such contracts are, therefore, upheld as well in respect to real as to personal property. We have in several cases held that a sale under a mortgage is not a *forced* sale because it was a sale under consent given under seal and irrevocably conveying an interest in the thing described. Such contracts are regulated by law and are specifically enforced in courts of equity. And by such transactions men may, through misfortune, become impoverished and their families brought to want. This is an incident of all human transactions, even where the utmost caution and circumspection are exercised, but this is not an argument in favor of encouraging indiscreet contracts made with a view to an evasion of the settled policy of the State. Few men would mortgage their household goods and their children's clothes to a hard creditor with the inevitable result brought vividly to their understanding, but many thoughtless and improvident people might be induced to obtain credit by merely "waiving the benefit of exemption," and thus placing the last blanket and bed and their own and the children's clothing at the mercy of a hard creditor, if an agreement like this should be sustained.

In view of the recognized policy of the States in enacting exemption laws and of the practically universal concurren

---

---

**Carter's Administrators v. Carter et al.—Opinion of Court.**

---

---

of the authorities on the identical question, our conclusion is that the "waiver" of the benefit and protection of the exemption laws contained in this note is not valid to defeat a claim of exemption.

It is urged by appellants that the exemption ought not to be allowed because the claim of exemption was not made until after the property had been sold by the administrators and the proceeds had gone into the general fund in the process of administration. To this it may be replied that it does not appear that these infants are chargeable with laches or that their guardian is so guilty. F. M. G. Carter died in January, 1880, and this bill was filed in 1881. But it appears that the administrators have the funds in their hands undistributed and the "waiver note" is unpaid.

Another point is urged in argument, that Carter, the father of these minors, had not "taken or enjoyed the benefit of the exemption" in his lifetime. We think he had enjoyed the benefit of the exemption because he had possessed and enjoyed the property and it had not been levied on or sold. The heirs are entitled to the same benefit of exemption that the ancestor was entitled to. *Baker vs. The State*, 17 Fla., 460. The purpose of the exemption clause in the Constitution is to exempt in favor of the heirs so much property as would have been exempt to the ancestor.

The fourth and last ground of error is in decreeing one thousand dollars in favor of complainants.

The personal chattels were appraised at \$634.34, of which \$200 was allowed to the children for "support" and the residue sold for \$469.23. There was realized on a note \$21.75. The script was worth \$34.56. The Toney Horne mortgage being foreclosed, the administrators bid in the property at \$500, and the same property was afterwards

Carter's Administrators v. Carter et al.—Opinion of Court.

sold by the administrators with other property for cash. We do not understand from the record what amount was realized by them from the sale of the land covered by the Horne mortgage, but whatever amount was so realized must be considered as the proceeds of the mortgage and must contribute toward the \$1,000 allowed as exempted in favor of the children.

As to the allowance for the "support" of the children out of the chattel property, that must be included as a part of the allowance under the exemption claim. The account would then stand thus:

Allowance to children .....	\$200	—	00
Appraised property sold for .....	469	—	23
Collected on note .....	21	—	75
County script, worth .....	34	—	56
			<hr/>
		\$725	— 54
From this must be deducted the amount of a lien on a gin which was among the appraised property, which lien was paid by defendants, say .....			
		\$170	— 00
			<hr/>
Balance .....		\$555	— 54

Whatever amount was realized by the administrators on the land bought in under the Horne mortgage after paying the expenses of foreclosure, should be ascertained and added to the above balance, and a decree therefor, not exceeding \$1,000, (less the \$200 allowance,) with interest from the time of the commencement of this suit, entered.

It appears that a sale of other land was made under an execution for a deficiency after foreclosure of the Horne mortgage, and a controversy is pending in respect to the proceeds of this sale. Should the amount of \$1,000 not be made up from the proceeds of the mortgaged property as above, and it should result that the execution sale for deficiency of the decree brings in a further sum, the court may make a further decree in favor of complaints as to the application of the same.



---

McDougald et al. v. Gilchrist's Executor et al.—Argument of Counsel.

---

The decree is reversed and the cause remanded with directions for further proceedings in accordance with this opinion. Each party will pay his own costs in and about this appeal.

---

DUNCAN A. McDOUGALD ET AL., APPELLANTS, VS. GILCHRIST'S EXECUTOR ET AL., APPELLEES

1. The fact that a testatrix by her will bequeaths certain mentioned property to her husband, and also certain other property to other relatives, but does not dispose of her entire property, is not evidence that she intends to exclude her husband from participating in the residue.
2. Under the laws of this State, where the wife having separate property, dies without a child, but makes a will disposing of a portion only of it, the surviving husband is entitled to the residue of such property, both real and personal, after the terms of the will have been carried out. McC. Dig., 471 §12.

Appeal from the Circuit Court for Gadsden county.

The facts of the case are stated in the opinion.

*R. B. Hilton* for Appellants.

The case is that of interpleader brought by the executor of Mrs. M. A. Gilchrist against her surviving husband and heirs at law claiming adversely the residue of her estate, *i. e.* the surviving husband claiming adversely the whole of the residue, and the heirs claiming it to his exclusion.

The answers of the McDougals, which is not denied, and is entirely consistent with the will, shows that the testatrix intended the husband to receive no more of her estate than was specifically given. The single question is,

---

McDougald et al. v. Gilchrist's Executor et al.—Argument of Counsel.

---

can a testatrix, by a will which does not dispose of all her property, deprive the surviving husband of the portion not embraced in her bequests. In other words, suppose Mrs. Gilchrist had, by her will, merely appointed an executor with a single other clause in which she would have said, "it is my will and desire that my husband shall receive a portion of my estate, real or personal," would it not be an absurdity to say that notwithstanding such a will, the testatrix, being childless, the husband would take the whole estate? If so, can it be less unreasonable in a case, which under the persuasion of her adviser and against her own or original purpose she does not give him *something manifestly* intending he shall take nothing else, to say he shall have the residue of unlimited amount? I have been able to find no cases in point, and though one cited in Williams on Executors, from 4 Beavan, looks the other way, yet that case can be no authority here.

So far as Gilchrist is concerned, the testatrix did not die intestate as to any portion of her estate. He was clearly intended to be excluded. Conceding that he would have been in the absence of a will, heir at law under the statute, nevertheless the will deprived him of this character. We contend, therefore, that the residue of the estate must go to the parties who would have been her heirs in the absence of the statute for the benefit of the husband.

*John W. Malone* for S. S. Gilchrist.

Mary A. Gilchrist, wife of S. S. Gilchrist, while a *femine* *covert*, made her last will and testament and therein disposed of a portion of her separate property only, and appointed E. C. Love the executor thereof. Afterwards she died childless, leaving her husband and brothers and sisters surviving her.

---

---

McDougald et al. v. Gilchrist's Executor et al—Opinion of Court.

---

---

The husband claimed the property of which she died intestate, and her brothers and sisters claimed it also. The executor filed a bill of interpleader against these several claimants, all of whom answered the bill and set up their several claims. The case was heard upon the bill and answers, and the court decreed that the husband was entitled to this property.

The husband claims it under and by virtue of the statutes of Florida. McClellan's Digest, 471, sec. 12.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

In October, 1881, Edward C. Love, as the executor of the last will and testament of Mary A. Gilchrist, filed his bill of interpleader in chancery, for the purpose of determining the rights of the heirs and legatees under the will. The testatrix was the wife of S. S. Gilchrist, and in and by her will disposed of a portion of her separate property only. She died without issue, leaving her husband and brothers and sisters, and some minor children of a deceased brother surviving her, the only heirs. The husband, S. S. Gilchrist, claimed the whole of the residue of her property, and the heirs claim it, to his exclusion. The several defendants answered the bill setting up their claims. The case was heard by the Chancellor on the bill and answers, and the court decreed that the husband was entitled to the property. The executor, by the decree, is "instructed, directed and required to pay and deliver to the said S. S. Gilchrist, or his solicitor, the said residue of said goods and chattels, rights and credits, moneys, effects, choses in action and personal property." From this final decree the other legatees and heirs, all mentioned in the will, as Duncan A. McDougald, Daniel F. McDougald, Archibald McDougald and others, bring their appeal.

---

McDougald et al. v. Gilchrist's Executor et al.—Opinion of Court.

---

The only question as presented in this case by the petition of appeal and the argument of counsel is, "Can a testatrix, by a will which does not dispose of all her property, deprive the surviving husband of the portion not embraced in her bequests."

By the terms of the will she bequeaths to her husband, Dr. S. S. Gilchrist, the sum of five hundred dollars in cash, the growing crops on her place, the stock of hogs, and a horse named "Pet." She bequeaths to her brother, Duncan McDougald, fifty dollars; to her brother, Daniel McDougald, fifty dollars; to her brother, Archibald McDougald, fifty dollars, and other sums to her relatives named in the bill of complaint, and who are appellants in this cause. The appellants claim that by reason of the fact that the testatrix bequeathed a certain specified amount of money and other property to her husband, that therefore it is evident she did not intend he should have any residue which might be left after the full carrying out of the will. Why would not the same reasoning apply to the appellants; to each of them she left a legacy; does it follow, therefore, that for that reason alone, they could not, if entitled otherwise, receive any portion of the residue? But the counsel for appellants say in their argument that the will itself, that she expresses a desire to be buried by the side of her first husband, and that upon her tombstone shall be inscribed the words: "Mary Ann, wife of John G. Smith," the name of her first husband, evidences the fact that she intended S. S. Gilchrist, her then husband, should have no further portion of her estate than she had bequeathed him. We cannot see that this fact points to the conclusion at which the counsel has arrived. It is evidence of nothing beyond the desire expressed by her. The reasons are not known, but the fact is not sufficient to cut off Gilchrist from any rights he may have under the law; nor are the

---

---

McDougald et al. v. Gilchrist's Executor et al—Opinion of Court.

---

---

allegations made in the answer of defendant, D. A. McDougald, sufficient for that purpose. The will was proven and letters issued, and the executor, before the commencement of this action, had entered upon the discharge of the duties of his office.

In 2d Williams on Executors, 1590, it is said: "Where there is no gift of the undisposed of residue, a testator cannot, by negative words, exclude one of his next of kin from participating in it. Thus, where a testator, by his will, cut off his widow and one of his daughters from any part of his property, and directed that they should not receive any benefit therefrom, *but had made no disposition of his property*, it was held that the widow and daughter were, nevertheless, entitled to their share in the undisposed of residue, under the statutes of distribution." The author cites Johnson vs. Johnson, 4 Beavan, 318. This case so cited we have not been able to examine.

In the case of Fitch vs. Webber, 6 Hare, 145, the testatrix devised and bequeathed her real and personal estate in trust, as to the real estate, for sale as soon after her decease as conveniently could be, and declared that the trustees should stand possessed of the proceeds of the sale as a fund of personal and not real estate, for which purpose such proceeds of the sale, or any part thereof, *should not, in any event, lapse or result for the benefit of the heirs at law*; and after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects, as she should direct by any codicil to her will. She made no codicil, and soon after died. The Vice-Chancellor in his opinion says: "What I am called upon to do is not to give effect to an intention expressed in the will, but to imply an intention not expressed in favor of parties to whom the testatrix's testamentary dispositions are as hostile as the clause of exclusion is to the

---

McDougald et al. v. Gilchrist's Executor et al.—Opinion of Court.

---

heir, parties whom she has excluded as directly as she has excluded the heir. How can I in such circumstances imply an intention in favor of those parties? much less say that such intention is a necessary implication. Admitting the intention to exclude the heir, is not the intention to exclude the next of kin equally clear? Where then is there room for a necessary or any implication in favor of the next of kin. I feel myself called upon to follow the course of decisions, in holding that the testatrix has expressed an intention to exclude the heir only for the purposes of her will, and that if her words express more, and she has failed to say who shall take the surplus, the law must dispose of it." *Bromley vs. Wright*, 7 Hare, 334, 344; *Flint vs. Warren*, 14 Sim., 554; *Leading Cases in Equity*, Vol. 1, part 2, 1184.

The statute of this State is, however, explicit on this subject, and controls this case. It provides "if married women die in this State possessed of real and personal property, or of either species of property, the husband shall take the same interest in her said property and no other, which a child would take and inherit, and if the wife should die without children, then the surviving husband shall be entitled to administration, and to all her property, both real and personal." *McC. Dig.*, 471, §12.

The decree of the Chancellor is affirmed.

---

---

Eldridge, Dunham & Co. v. Post—Statement of Case.

---

---

**ELDRIDGE, DUNHAM & Co., APPELLANTS, vs. R. B. Post,  
APPELLEE.**

1. **An assignment by a debtor to a creditor of his interest in lands of his father's estate in which he has a fee in remainder, the assignment not being recorded, is not valid in law or in equity as against the lien of a subsequent judgment against the debtor in favor of a third party who had no notice of the assignment.**
2. **A judgment against a tenant in common or co-partner is a lien upon the interest of the debtor in the land, and if upon a partition this interest is converted into money, the priority of the judgment lien is preserved as against the fund.**
3. **The lien of a creditor under a creditor's bill has no preference over the lien of prior judgments against lands which were subject to levy under execution. The priority of lien of a judgment creditor by the filing of a creditor's bill exists as a reward of diligence in the discovery of and subjecting assets of the debtor which were not within the reach of execution at law; and is not allowed as against a prior judgment which was a lien at law upon property subjected and converted into money by a sale in partition proceedings.**
4. **When in partition of land a sale has been made and the property converted into money, a proper and usual mode of bringing forward the demands of creditors who have a right to satisfaction out of the funds is to intervene by petition.**

**Appeal from the Circuit Court for Leon county.**

**The 2d, 3d, 4th and 5th items of the last will and testament of Mr. David C. Wilson, Sr., were as follows:**

**Second. I will and direct that the present mercantile business of D. C. Wilson & Co. be continued during the natural life of my wife, Elizabeth Wilson, provided the same can be done with profit and satisfaction, under the supervision of my said executors and executrices, one-half of the net profits thereof to go to the credit of D. C. Wilson, Jr., and the other half to the credit of my estate.**

---

 Eldridge, Dunham & Co. v. Post—Opinion of Court.
 

---

[This business was discontinued some time before the death of Mrs. Wilson.—REP.]

Third. I do will and direct that all the rents, issues and profits arising from my real estate be devoted to the support of my family, consisting of my wife, my daughter, Mary Catherine, and my daughter, Florida A. F. Ward and her three children, R. A. Gibson, Lizzie and D. L. Warden, and if the rents, issues and profits aforesaid, be not sufficient for that purpose, that so much of the net profits of the firm of D. C. Wilson & Co., belonging to my estate, as may be necessary to supply the deficiency, be used and applied for that purpose.

Fourth. I do will and direct that no division, under any circumstances, shall be made of my estate, either real or personal, until the decease of my wife, Elizabeth Wilson, but that the same be subject to and under the control of my said wife, under the advice and assistance of my executors and her co-executrix.

Fifth. It is my will and desire that on the death of my wife, my estate be equally divided, share and share alike, between my children, or in the event of the death of either of them previous to the decease of my wife, the portion of such deceased child or children shall go to his child or children, such child or children inheriting in place of its deceased parent.

*R. B. Hilton* for Appellants.

*George P. Raney* for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court—

This is a controversy between creditors.

D. C. Wilson, Jr., on August 1, 1873, assigned by an indenture, not witnessed or recorded, to appellants, so much of the estate of his father, then deceased, as would amount



---

**Eldridge, Dunham & Co. v. Post—Opinion of Court.**

---

thousand dollars, to secure their claim against him  
ing to \$1,816.85. The estate was principally real  
y, in which D. C. Wilson, Jr., had, under the will  
father, a vested remainder in fee, to vest in posses-  
pon the death of his mother. His mother died in  
ber, 1880. This assignment was not recorded.

& Hobby recovered a judgment against D. C. Wil-  
., in the Circuit Court in Leon county, where the  
as situated, on the 5th of November, 1875, for \$487,-  
costs.

ellants recovered a judgment against said D. C. Wil-  
., in the same court on February 4, 1878, for \$2,026,-  
costs.

lands were sold under proceedings for partition  
the heirs and the part of the proceeds in money going  
C. W., Jr., were deposited in bank under the direc-  
the court.

ellants, soon after the death of the mother of the  
ent debtor, filed their bill to subject his interest in  
ate to the payment of their claim by virtue of  
ignment of August 1, 1873. Post, survivor of Post &  
, intervened by petition, after the partition sale, claim-  
iority by virtue of the lien of the judgment of Post &  
, which was recovered prior to the judgment of ap-  
s. This judgment of Post & Hobby was a lien upon  
sted interest of the judgment debtor upon its rendi-  
nder the statute, and was therefore entitled to prior-  
payment out of the proceeds of the sale of the real

1 Story's Eq. Jur., 523; Garvin vs. Garvin, 1 Rich.,  
62.

indenture by which D. C. Wilson, Jr., assigned his  
t in the property was not recorded so as to be a  
upon the real estate as against creditors or subse-  
purchasers without notice. The statute says: "No

---



---

Eldridge, Dunham & Co. v. Post—Opinion of Court.

---



---

conveyance, transfer or mortgage of real property, or of any interest therein, shall be good or effectual *in law or in equity* against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same shall be recorded in the office assigned by law for that purpose." McClellan's Dig., 215, §6.

It appears that Post & Hobby had no notice of this lien of the appellants prior to the recovery of their judgment. The arbitrary provision of the statute forbids the courts of law or equity giving vitality to that assignment as against the creditor or a subsequent purchaser for value without notice of the lien. Massey vs. Hubbard, 18 Fla., 688, 694; Carr vs. Thomas, Id., 736, 750; Gintean vs. Wisely, 47 Ill., 433; McFadden vs. Worthington, 45 Ill., 362; Massey vs. Westcott, 40 Ill., 160; Martin vs. Dryden, 1 Gilman, 187; De Vendell vs. Hamilton, 27 Ala., 156.

The second proposition of appellants is that by reason of their diligence in filing their bill, the discovery and bringing into court the defendant's assets, they are entitled to priority over all other creditors to the full extent of their claim with all costs and expenses and a reasonable solicitor's fee for bringing the fund into court.

That is the rule as adopted by courts of equity upon bills filed by judgment creditors to discover and reach assets not subject to execution at law. The judgment creditor who first institutes a suit and serves his subpoena, or otherwise entitles himself to the law of *lis pendens*, obtains a lien upon the assets which his bill seeks to reach, and upon obtaining a decree he is entitled to the fruits of his diligence. But if property be subject to execution at law so that the plaintiff can levy his writ thereon, it is not, before it vests in the receiver, so bound by a bill that it cannot be levied on and sold under an execution issued by another creditor. Freeman on Executions, §434, and notes.

---

---

Rushing et ux. v. Thompson's Executors—Syllabus.

---

---

Here the property was subject to the execution of appellants and of Post & Hobby to the extent of the interest of the judgment debtor before the partition sale; and after the sale the proceeds were applicable to the payment of the judgments in the order of their priority, as we have before shown. There was no discovery of property not liable to execution at law, in respect to the real estate from which this fund was in great part produced.

The lien of the judgment of Post & Hobby upon the real estate, having priority of the judgment of the appellants, it is entitled to preference of payment out of the proceeds of the sale, the fund not having been discovered by means or through the influence of the complainants' bill as a creditor's bill.

The creditors, Post & Hobby, intervened in the proceedings for a partition by petition. "That this is the usual and proper mode of bringing forward the demands of such creditors having a right to come into equity for satisfaction out of the fund, is well settled." Garvin vs. Garvin, 1 Rich., 60, citing Simons vs. Simons, Harper's S. C. Eq., 256.

The decree of the Circuit Court is affirmed.

---

ELIJAH P. RUSHING ET UX., APPELLANTS, VS. THOMPSON'S  
EXECUTORS, APPELLEES.

1. A decree *pro confesso* in default of pleading against a defendant who has been summoned by publication, must be signed by the Judge. If signed by Solicitors it is nugatory. [In this case there is another order signed by the Judge, which is substantially a decree *pro confesso*.]
2. A final decree rendered against a party falling to plead or answer,

---

Rushing et ux. v. Thompson's Executors—Statement of Case.

---

without a decree *pro con.* having been entered, may be irregular; but the final decree is not therefore void. If erroneous, it may be set aside on appeal, but no advantage can be taken of the error collaterally, as when the record is offered in evidence.

3. After a decree *pro confesso* the complainant may proceed *ex parte*, and on his motion the cause may be referred to a referee for trial and final decree under the Constitution and the statute, and a decree rendered by a referee so appointed, when duly recorded, is effective as a decree rendered by the court.
4. A referee is a judicial officer appointed by the Circuit Court, and the order appointing him, though irregular, makes him an officer *de facto*, whose title cannot be assailed in a collateral proceeding. If the appointment be irregularly made the remedy for the error is by motion in the same court or by appeal.

### Appeal from the Circuit Court for Duval county.

Appellants brought ejectment against respondents, Lofton and McDonell, executors of E. M. Thompson, to recover certain lands in Duval county, and a verdict was had against plaintiffs, who appeal from the judgment thereon.

Plaintiffs proved a deed executed by Lofton to Eliza G. Magruder in 1876; that she died in 1883, and that Rushing's wife, one of plaintiffs, was her daughter and only heir at law.

Defendant offered in evidence the record of a decree in chancery rendered in the county of Duval by a referee by which decree the deed of Lofton to Mrs. Magruder was annulled for fraud and held to be utterly void.

The record of the decree consisted, (1,) of a bill in equity filed by Alexander Lofton October 16, 1877, against Eliza G. Magruder, alleging fraud and deceit in procuring the deed in 1876 and praying that it be declared void and cancelled; (2,) a subpoena issued and returned not served, defendant not found; (3,) an order signed by the Judge October 18, 1877, reciting that it appeared by affidavit that

---

---

**Rushing et ux. v. Thompson's Executors—Statement of Case.**

---

---

the defendant, Eliza G. Magruder, resides in the State of Georgia, and ordering that she appear and plead or demur to the bill, or that it would be taken as confessed, and that this order be published four months; (4,) an affidavit of the publication required for four months, commencing October 23, 1877, filed March 4th, 1878; (5,) a paper, in form a decree *pro confesso*, defendant having failed to appear or plead, entered on rule day in March, 1878, not signed by the Judge but signed by complainants' solicitors; (6,) an order signed by the Judge May 8, 1878, to wit: "It appearing to the court by the papers on file in this suit that a bill has been regularly filed; that no plea, answer or demurrer has been put in by the defendant, that a decree *pro confesso* has been regularly taken and filed and entered, and that the time for further pleading has expired under the rule; it is thereupon ordered, on motion of complainants' solicitor, that the said cause be referred to a special master to take testimony therein and to report with all convenient speed the same to this court." H. Jenkins, Jr., was appointed as such special master; (7,) an order dated March 19th, 1880, signed by the Judge as follows: "Whereas, on motion made to this court of chancery heretofore in this cause by solicitors for complainants, the same was by an order of this court referred to Horatio Jenkins, Jr., Esq., as special master *pro hac vice* to take testimony therein, and to report the same to this court, and the said special master is now engaged in taking said testimony; now on motion of the said complainants' solicitors it is ordered that said cause be and the same is hereby referred to Horatio Jenkins, Jr., Esq., a practicing attorney of this court, as referee for trial and final determination according to the statutes of this State in such case made and provided; (8) a final decree in the cause, annulling the deed as above stated. To the in-

---

---

Rushing et ux. v. Thompson's Executors—Argument of

---

---

introduction of this record and every part thereof the plaintiff objected, and especially objected to the called decree *pro confesso* because it was entered at a time for appearance had expired and because it was not signed by the Judge or Clerk. Objection was made to the order of reference to take testimony on the same. Objection was made to the order referring the case to a referee for trial on the ground that the court had no authority to refer the same for trial by a referee on the same without the consent of the defendant. The final decree was objected to on the ground of its being void and because it was void, the same not having been rendered by any competent court and because the decree *pro confesso* on which such final decree was based. The court overruled the objections and admitted the said record as evidence to the jury.

The court charged the jury that if the deed to Mrs. Magruder was cancelled and annulled by the decree rendered by Jenkins, as referee, appointed by the Judge of the Circuit Court, then said deed was void, and they should find for defendant, which was excepted to by plaintiffs.

*C. P. & J. C. Cooper* for Appellants.

This is an action of ejectment, brought on the 1st of August, 1883, by the Appellants, plaintiffs, herein below, against the defendants, Alexander Lofton and A. McDonell, the executors of E. M. Thompson. They are appellees here, to recover certain lands in Du

This case was tried with verdict and judgment for the defendants, and from that final judgment this appeal is taken.

The record shows that the plaintiffs proved the title of the deed to their ancestor by one of the

---

Rushing et ux. v. Thompson's Executors—Argument of Counsel.

---

Alexander Lofton; they proved that Lofton was in possession when he made the deed to their ancestor, and the death of their ancestor, and their relationship to Lofton's said grantee, their ancestor, showing that Octaviah Rushing was the sole surviving heir of said grantee of Lofton. The plaintiff then had shown a right to recover the lands in controversy. Now, what was the defence.

The defendants introduced the record and final decree in the chancery case of Alexander Lofton vs. Elijah G. Magruder, to show that the deed under which plaintiffs claim title from Alexander Lofton to Eliza G. Magruder, the ancestor of plaintiffs, of the land in suit, had been decreed to be null and void and cancelled of record, and could not be used to show title by plaintiffs. The court admitted this record and decree, and charged the jury that plaintiffs could not recover under the deed of their ancestor, because it was null and void under said decree.

The questions, then, for review in this court, are whether there was any decree setting aside this deed, and whether this record and decree should have been admitted in evidence as a defence in this cause.

An inspection of this decree shows that it was made on the 5th day of May, A. D. 1880, by Horatio Jenkins, Jr., as referee, and the order appointing Horatio Jenkins such referee, shows that he was made such referee on the motion of complainant, Lofton's solicitor *alone*, and not the consent or "application" of both complainant and defendant. This record in case of Lofton vs. Magruder shows that the service was made upon defendant by publication; that on the 4th day of March, 1878, a decree *pro confesso*, signed by complainant's solicitor, was entered against the defendant, Magruder; a special master was appointed to take the testimony on motion of complainant's solicitor, testimony taken, and then, in that condition of the case,

---

 Rushing et ux. v. Thompson's Executors—Argument of Counsel.
 

---

this referee, who made this decree, was appointed on motion of complainant's solicitors.

This paper, which purported to be a decree by a reform, cancelling the deed under which plaintiffs, Rushing and wife, claimed title, was not a decree at all, but was totally void, of no effect, and ought not to have been allowed to have been introduced in this case.

1st. Because Horatio Jenkins had no authority of law to make this decree, as he must derive his authority from the order of Judge R. B. Archibald, of the 19th day of March, A. D. 1880, appointing him, and said Judge had no authority, under the Constitution and Laws of this State, to delegate his power to another as Circuit Judge, except on the "application of the parties," that is, of both parties to a suit. Defendant had never appeared, and no attempted decree *pro confesso* had been taken: under these circumstances Judge Archibald's order appointing this referee was made.

The provision of the Constitution is that on "application of the parties" the Circuit Court may appoint a referee. Jenkins, therefore, under the circumstances of this case, had no jurisdiction at all of the cause, as the Circuit Judge had no authority to appoint him.

"Jurisdiction is conferred upon courts by the Constitution and Laws of the country in which they are situated, authorizing them to hear and determine causes between parties, and to carry their judgments into effect."

"Jurisdiction is conferred by the authority which organizes the court, and is to be sought for in the general nature of its power, or in the authority specially conferred."

A decree pronounced by a court having no authority to determine the matter in issue is void, and may be shown to be so in any collateral proceeding in which it is. 13 Fla. 393;



---

---

Rushing et ux. v. Thompson's Executors—Argument of Counsel.

---

---

2 Ohio S., 223; 5 Foster, 299; G. Green, 2 Iowa, 15; 29 Wis., 419; Freeman Judgments, §120; 10 Wall., 308.

Whenever jurisdiction is to be acquired in a special manner, as of a referee, we contend, to wit: on the consent of the parties, the particular state of facts necessary to confer jurisdiction must have existed, or the judgment is void. Here the referee was appointed on motion of one party only, and the referee never obtained jurisdiction to make the decree attempting to cancel this deed. 5 Harris & Johnson, 130; 27 Ala., 391, 663; 6 Wheat., 119; 11 Wend., 647; 3 Ohio, 553; 2 Blackford, 82; 3 Humph., 313; 6 Fla., 13.

This decree is based on a so-called decree *pro confesso* signed by complainant, Lofton's solicitors, not by Judge or Clerk of Court, and is made 30 days before the time when it could be taken, so that no decree final could go on such *pro confesso*.

This decree was made on the 5th day of March, A. D. 1880, and filed February 3d, 1881. The two years for bill of review or appeal has passed. Mrs. Magruder did not die until February, A. D. 1883. These plaintiffs cannot now correct or have reviewed these errors, under these circumstances, so that they may now prove the decree was erroneous, even in this collateral proceeding. Vose vs. Morton, 4 Cush., 27; 11 Met., 370; 2 Met., 135; 4 Cow., 458.

This decree in case of Lofton vs. Magruder, introduced in this case, has never been confirmed or adopted by order of the Circuit Court, making it the decree of said Circuit Court of Duval county, Florida. The constitutional provision allows referee to try case, but nowhere provides for his entering a decree to make a decree of record of any court in this State.

We insist that the act of 1879, authorizing the decision

---



---

Rushing et ux. v. Thompson's Executors—Opinion of Court.

---



---

of a referee to be made a decree of the Circuit Court without action by that court, is unconstitutional and void, because the provision of the Constitution authorizing the appointment of referees confines their powers to trying the cause, and does not include the entering of a decree. The Constitution provides for certain courts, and says there shall be none other. This act, then, as to giving powers to a referee to enter final decree gives him judicial power unauthorized by the Constitution. This court, in case of Chambers vs. Savage, 13 Fla., page 588, has decided that this power to try a cause by a referee does not include the power to make a final judgment or decree binding in law as such. Chambers vs. Savage, 13 Fla., 587.

For the foregoing reason we say the record and decree ought never to have been admitted in evidence in this case of Rushton and Wife vs. Lofton, and verdict and judgment should have been for plaintiffs, who had shown their right to recover the lands in question.

We contend that there is no decree *pro confesso* or order taking bill as confessed, and therefore that decree final is not a decree and defendants were not cut off from their right to be heard on appointment of referee.

*T. A. McDonell* for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court—

The material questions are, 1, whether the cause was in a condition to be referred for trial at the time it was referred; 2, whether the referee can be appointed on the application of one party, the other being in default; 3, whether under the Constitution and laws a referee has power to try a cause and render a final judgment or decree, to be effectual as a judgment or decree of the Circuit Court without further action of the Judge of the Court.

---

---

Rushing et ux. v. Thompson's Executors—Opinion of Court.

---

---

The Circuit Court had jurisdiction of the bill in equity to **set** aside and cancel a deed for fraud. On the return of the subpoena showing defendant was not to be found the **court** had power to order defendant to appear and that the **order** be published. This was done and publication was **made** for four months, which time expired February 23, 1878. On the fourth of March following complainants' **solicitors** entered, in form, an order *pro confesso* not signed by the Judge. This order was of no effect without the **signature** of the Judge. It was entered before the expiration of **one** month after the expiration of the four months, and **would** have been for that reason irregular if it had been **signed** by the Judge. Sec. 13, Act of 1828, McC. Dig., 155. On the eighth day of May, 1878, the Judge made **and** signed an order reciting "that no plea, answer or **demurrer** has been put in by the defendant, that a decree *pro confesso* has been regularly taken and filed and entered, **and** that the time for further pleading has expired under the rule," it was, therefore, ordered that the cause be **referred** to a master to take testimony.

This order was made more than one month after the **expiration** of the publication for four months of the order to **plead**. We can but regard this order of May 8, in its terms **and** effect, as an order taking the bill as confessed on that **day**. It refers to an order *pro confesso* as having been duly **entered** and adopts it over the signature of the Judge. It is **equivalent** to signing the first order on May 8, the date of the last order.

Afterwards, on the 19th March, 1880, on motion of the complainants' solicitor, it was ordered that the cause be **referred** to H. Jenkins, Jr., a practicing attorney, as **referee**, for trial and final determination according to the **statute**.

It is objected that this order is void because the Consti-

---

Rushing et ux. v. Thompson's Executors—Opinion of Court.

---

tution does not authorize such reference for trial, except  
 “upon the application of the parties,” thereby meaning ~~a~~ll  
 the parties in a suit.

By rule 44 in equity, after the entry of an order taking  
 the bill as confessed in default of pleading, “thereupon ~~the~~  
 cause shall be proceeded in *ex parte*,” &c. And thus, ~~the~~  
 defendant having been summoned in the manner required  
 by law, and having failed to appear and plead within ~~the~~  
 time allowed, there is but one party before the court to ~~p~~ro-  
 ceed in the cause and the court is authorized to proceed to  
 take testimony and to a final determination of the ~~matters~~  
 before it in any manner authorized by law. The trial by  
 a referee is provided for the convenience of the court and  
 of parties and to expedite causes. In this case, there being  
 but one acting party before the court, it is entirely consist-  
 ent with the constitutional provision to refer the cause for  
 trial on the motion of the only party before the court en-  
 titled to speak.

Upon another ground, however, it may be said that the  
 decree could not be collaterally attacked. It has always  
 been held that the title of an officer, *de facto*, acting under  
*color* of an election or appointment, cannot be inquired into  
 collaterally, whether the office be judicial or ministerial.

In Indiana it was provided by law that in case of the  
 temporary absence of the Circuit Judge, the clerk, auditor  
 and sheriff were authorized to appoint some member of the  
 bar to preside as Judge. A *vacancy* occurred in the office  
 of Judge and the officers mentioned appointed an attorney  
 to preside, the appointment being in legal form. The  
 court held that the law did not authorize such an appoint-  
 ment during a vacancy in the office of Judge, yet that a  
 court *de facto*, if not *de jure*, was constituted, and a party  
 convicted of larceny could not, after conviction, call in

---

---

Rushing et ux. v. Thompson's Executors—Opinion of Court.

---

---

question the authority of the court. Case vs. The State, 5 Ind., 1.

Where, in Ohio, a clerk had been appointed by Judges, whose appointment to the judicial office had been regular in form but at the time of the appointment of the clerk by them they were not rightfully in office, it was held that as they were in by color of right they were Judges *de facto*, and as to the public or individuals their acts must be held valid. State vs. Alling, 12 Ohio, 16.

It would be strange, indeed, if the judgment or decree of a court of competent jurisdiction could be impeached on the ground that a flaw had been discovered in the commission of the Judge. People vs. White, 24 Wend., 520, 527.

In Tennessee, one under thirty years of age was appointed Circuit Judge, contrary to the provisions of the Constitution. The court says: The Governor's commission renders the functionary *prima facie* competent and clothes him with powers of the office so far as his official acts are concerned. He may be removed from office and his powers terminated by the proper proceedings, but until that is done his acts are binding. The plaintiff in error had been indicted for a crime when this judge presided, and the judgment was affirmed. Blackburn vs. State, 3 Head., 690.

The same doctrine was held in Pepin vs. Lachenmeyer, 45 N. Y., 27; People vs. Cook, 8 N. Y., 67, citing many authorities; McInstry vs. Tanner, 9 Johns., 135; Buckingham vs. Ruggles, 15 Mass., 180; Tolle vs. Stone, Burnett, Wis., 230; *In re Boyle*, 9 Wis., 260.

And so it seems that though there be a defect in the title of a person exercising the duties of an office, whether it be on account of some personal disqualification or because of the improper exercise of the appointing power, if he is in the office under the color of an appointment by proper authority, his official acts are recognized as valid

---

Rushing et ux. v. Thompson's Executors—Opinion of Court.

---

and not liable to collateral attack on the ground of defect in his title.

A referee is a judicial officer who may be appointed by the Circuit Judge to try and determine a cause before the court and according to the authorities in analagous cases, his commission, though there may be some irregularity in his appointment, makes him an officer *de facto* whose title cannot be assailed in a collateral proceeding. If the Judge has improvidently made the order appointing the referee, the remedy for the error is in the same court or by appeal.

Counsel for appellant, arguing that the finding and decision of the referee is not a final decree, refer to the ruling of this court in Chambers vs. Savage & Haile, 13 Fla. 555. That case arose before the passage of any act by the Legislature regulating appeals or regulating the proceedings and trial before referees, and the manner of entering judgments upon their findings, and the result was that there was then no law providing for the entry of the judgments in the record of any court, there was no machinery provided for the enforcement of such judgments or for appealing therefrom. No provision had been made for filing or recording the proceedings of the referee in the clerk's office, or making the finding a judgment of the court, and a return made by the clerk upon an appeal could not be recognized until the Legislature should make proper provision, or the court should direct judgment to be entered upon the finding of the referee.

The action of the Legislature in 1879, chapter 312<sup>2</sup>, supplemented the provision of the Constitution on the subject; regulated the trial, empowered the referee to summon witnesses, to file his findings in the clerk's office, provided for granting new trials, and the entering and recording of his judgments and decrees by the clerk, and that the same shall be effected as other judgments and decrees of the Cir-

---

---

Rushing et ux. v. Thompson's Executors—Opinion of Court.

---

---

cuit Court. The judgments and decrees of referees duly appointed are intended by the constitutional provision to be efficacious and final as judgment and decrees rendered by the Circuit Judge. The referee for the purposes of trial and final decisions is substituted for the Judge. The cause is commenced in the Circuit Court and the judgment is that of the court when duly entered.

But it is said by appellant that the proceedings before the referee were unauthorized and void, that he had no jurisdiction of the cause for the reason that the decree *pro confesso*, so-called, was prematurely entered and was not signed by the Judge as the law requires and therefore the judge had no power to take further proceedings looking to a final decree.

We think the order made subsequent to the irregular entry of the order *pro confesso* is substantially a decree taking the bill as confessed, as before observed. But if no regular decree *pro con.* had been entered it did not affect the jurisdiction of the court to render a final decree.

In *Savage vs. Berry*, 2 Scammon, 545, it was held that the want of a formal entry that the bill be taken for confessed is not material and does not prejudice the defendant; that the objection is purely technical, not in the least affecting the justice of the case, and that the want of such formal entry in the record could not be assigned for error.

In *Heath vs. Mitcherson*, 1 J. J. Mar., 547, the court say that after due service the court had a right to decree as to the defendant and it was not necessary that it should appeal formally on the record that the bill was taken as confessed against him. The decree was affirmed on appeal.

In *Shields vs. Bryant*, 3 Bibb, 525; *Carman vs. Watson & Pope*, 1 How., Miss., 333; and *Legrande vs. Francisco*, 3

---

Rushing et ux. v. Thompson's Executors—Opinion of Court.

---

Munf., 83, the final decree was set aside as *irregular* or *erroneous* because no decree *pro confesso* had been entered.

In Brown vs. Humphreys, 1 J. J. Mar., 392, a final decree was set aside as *irregular* because the decree *pro confesso* was entered before the time for appearance had expired.

And so it seems that the courts have held that the *absence* from the record of a decree *pro confesso* is not good ground for reversal of a final decree; or that if no decree *pro confesso* had been entered the final decree was *irregular* or *erroneous* and reversed, but we have found no case in which the final decree was held void for that reason, or that it affected the jurisdiction of the court.

It is a well settled rule that jurisdiction being obtained over the person and the subject matter, no error in its exercise can make the judgment void. The authority to decide being shown, it cannot be divested by being improperly or incorrectly employed. Freeman on Judg., §135, and notes.

Especially is it settled also that a domestic judgment cannot be assailed collaterally, there being no want of jurisdiction shown by the record itself. Whatever errors or irregularities may appear upon its face to have been committed by the court rendering a judgment, if the court has acted within its jurisdiction once obtained the judgment cannot be assailed, except in the court where it was pronounced, by moving to set it aside, or by equitable aid to prevent its execution, or by appeal to a higher tribunal to reverse or correct it. Freeman Judg., §§130, 135, and authorities cited.

In this case there does not appear to be a defect of jurisdiction. The court of chancery had power to decree the prayer of the bill, and to acquire jurisdiction of the person as to the *res* by publication and proof thereof. On completing the statutory service of notice the court had power



---

---

Moody et ux. v. J. T. & K. W. R. R. Co.—Syllabus.

---

---

to appoint a referee and the referee had power to hear and determine. No error is alleged in the proceedings from the filing of the bill to the final decree, which is not, if it be error, an irregularity not affecting the jurisdiction. If irregularity exists, a court of superior, not of collateral jurisdiction, can correct it.

The appellants here are suing as the heirs at law of the grantee named in the deed which was set aside by this decree. She was a party to the decree annulling that deed, and the plaintiffs claim in her right and occupy the same position she would occupy if she was living and was the plaintiff here instead of her heirs. They are, therefore, directly affected by the decree as though they had been parties, and can avoid it only as Mrs. Magruder herself could avoid it if she were living.

There was no error in admitting the record of the decree as evidence, and the effect of it was necessarily to destroy the plaintiff's evidence of title.

The judgment is affirmed.

---

**PARAN MOODY ET UX., APPELLANTS, VS. THE JACKSONVILLE,  
TAMPA AND KEY WEST RAILROAD COMPANY ET ALS.,  
APPELLEES.**

1. The State has the right to make a compulsory purchase of, or to condemn the property of the citizen for a public use or purpose, just compensation being made to the citizen for it.
2. Such right the State through the legislative department of the government may grant to an incorporated railway company having the usual franchises and duties attaching to such companies, to the extent that the property is necessary for the use of the corporation in accomplishing the purposes of its creation. The

---

Moody et ux. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

statute, however, must provide just compensation to the citizen for his property so authorized to be taken.

3. Neither an award of damages, nor a judgment against a corporation for damages ascertained, or to be ascertained by commission, is a just compensation to the citizen for the appropriation of his property by the corporation to its use in the construction of its road.
4. The designation of the corporation in whom such right to condemn for public use is to be vested, the method of condemnation and the fixing the nature and extent of the compensation to be made for the property, are powers vested exclusively in the legislative department of the government.
5. In this case an entry for the purpose of continuing an unlawful appropriation or taking was enjoined. Subsequently the injunction was dissolved upon the corporation obtaining a bond approved by the Judge under which the value of the property to be taken was secured to be paid after appraisement to the landowner: *Held*, In the absence of legislation giving such right to the corporation, that the court had no power to authorize a compulsory purchase by it or to prescribe a method of condemnation, or fix a compensation, just or unjust; that these were legislative "functions," which no part of the judicial department of the government could exercise unless the power so to do was "expressly provided for by the Constitution." The last clause of section 8 of the Declaration of Rights, Article 3 of the Constitution, and so much of chapter 1987 of the Laws, as proposes to vest in railroad corporations the right to condemn property and to fix the compensation to be made, construed.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

*E. M. L'Engle* for Appellants, cited:

Cooley's Const. Lim., [618], [620]; Morawetz on Private Corp., §32; Bradley vs. N. Y. and N. H. R. R. Co., 21 Conn., 306-7; 4 Hill, (N. Y.) 81; Charles River Bridge vs. Warren Bridge, 11 Peters, 420; Perrin vs. C. and D. C. Co., 9 How., 172; Sprague vs. Birdsall, 2 Cowen, 420; Young vs. McKenzie *et al.*, 3 Kelly, (Ga.) 45; Mims vs. M.

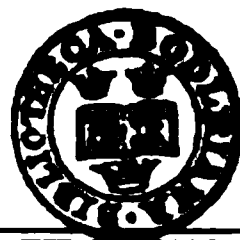
---

Moody et ux. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

and W. R. R. Co., *Ib.*, 338; Young vs. Harrison *et al.*, 6 *Ib.*, 150; B. B. & C. R. R. Co. vs. Terris, 26 Texas, 601-2; Opinion of Sharkey, C. J., in Thompson vs. G. G. R. & B. Co., 3 How., (Miss.) 248, *et seq.*; Walther vs. Warner, 25 Mo., 277; Shepardson vs. M. & B. R. R. Co., 6 Wis., 605; Powers vs. Bears, 12 Wis., 213; McCann vs. Sierra Co., 7 Cal., 121; Carson vs. Coleman, 3 Stockton, 106; Rubottom vs. McClure, 4 Blackf., 505; Loop vs. Chamberlain, 20 Wis., 135; White vs. N. & N. R. R. Co., 7 Heisk., (Tenn.) 518; S. W. R. R. Co. vs. S. & A. Tel. Co., 46 Ga., 43; Gray vs. 1st Div. of St. Paul and Pacific R. R. Co., 13 Minn., 315; U. S. vs. Russell, 13 Wall., 627; Parham vs. Justices, 9 Ga., 341; Riber vs. Striker, 63 N. Y., 136; Piscataqua Bridge vs. N. H. Bridge, 7 N. H., 70; Bloodgood vs. M. & H. Ry. Co., 18 Wend., 9; 2 Kent, (12th Ed.) 339, *et seq.*, and notes; 1 Redfield on R., 297, *et seq.*, and notes; Ashe vs. Cummings, 50 N. H., 591; Lowell vs. Boston, 111 Mass., 457, 454, 467; Angell on Water Courses, (7th Ed.) §466 a, (p. 624) note 1, and p. 651, n. 4; McC. Digest, p. 281, §14; McC. Digest, p. 282, §16; McC. Digest, §17; Burns vs. M. & M. R. R. Co., 9 Wis., 450; McAulay vs. W. V. R. R. Co., 33 Vt., 311; Carson vs. Coleman, 3 Stockton, 106; Miller vs. A. & S. R. R. Co., 6 Hill, (N. Y.) 61; 7 N. H., 70; 1 Story's Eq. Jurisp., §§64, 96, 177; Bacon's Abridgement, Title Court of Chancery, C; Authorities cited in 3 Wait's A. & D., 150; Walther & Warner, 25 Mo., 285; Piscataqua Bridge vs. N. H. Bridge, 7 N. H., 71, 72; Henniker vs. Contoocook Valley R. R. Co., 29 N. H., (9 Foster) 152, and authorities cited; Brown vs. Beatly, 34 Miss., 243-4, and authorities cited; 50 N. H., 616; Henderson *et al.* vs. N. Y. C. R. R., 78 N. Y., 423; 1 Story's Eq. Jurisp., 64 k to §77.

*John T. & George U. Walker* on same side, cited:




---

Moody et ux. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

2 Kent's Comm's., (4th Ed.) 339; 1 Blackstone Comm's., 139; Webster's Dictionary; Pumpelly vs. G. B. Co., 13 Wall., 166, 177, 178, 179, 181; Orr vs. Quinby, 54 N. H., 646; 54 N. H., 611; 1 Story's Eq. Jur., secs. 64, 96, 177; U. S. vs. U. P. R. R., 91 U. S., 85; 3 Kelly, (Ga.) 45; Cooley Const. Lim., 182, 184; Thompson vs. G. G. R. R., 4 How., 247; White vs. N. & N. R. R. Co., 7 Heiskell, 518; Fletcher vs. Peck, 6 Cranch, 87; Morris vs. People, 3 Denio, 381; DeCamp vs. Eveland, 19 Barb., 81; Clark vs. People, 26 Wend., 599; Cons. of Ala., Art. 2, Sec. I; Bloodgood vs. M. & H. R. R., 18 Wend., 9; 1 Redfield on Railways, 261, sec. 71; Henderson *et al.* vs. N. Y. C. R. R., 78 N. Y., 423; Gardner vs. Newburgh, 2 Johns., 162; Rogers vs. Bradshaw, 20 Johns., 735; Jerome vs. Ross, 7 Johns., 316; Bloodgood vs. M. & H. R. R., 14 Wend., 53; 18 Wend., 10; Chapman *et al.* vs. Gates, 54 N. Y., 143, 146; S. W. R. R. Co. vs. S. & A. Tel. Co., 46 Ga., 51; 12 Am. Reports, 585; Parham vs. The Justices of Decatur Co., 9 Ga., 341; Bohlman vs. Green Bay and L. P. R. R. Co., 30 Wis., 107; Powers *et al.* vs. Bears *et al.*, 12 Wis., 213; Shepardson vs. Milwaukee and Beloit R. R. Co., 6 Wis., 605; Pittsburg vs. Scott, 1 Barr, 309, (1 Pa. St.); Commonwealth vs. Wood, 10 Pa. St., 97; White vs. R. R. Co., 7 Heisk., 533; Butler vs. Sewer Commissioners, 39 N. J., (Law) 665; Bonaparte vs. C. & A. R. R. Co., 1 Bald., C. C. U. S.,—; Ashe vs. Cummings, 50 N. H., 591; Henry vs. Dubuque & Pacific R. R., 2 Iowa, 288; Sater vs. Plank Road Co., 1 Iowa, 386; Syracuse vs. Cincinnati, 14 Ohio, 174; Gray vs. First Div. of St. P. & P. R. R. Co., 13 Minn., 315; B. B. Brazos & Colorado R. R. Co. vs. Ferris, 26 Texas, 588; Haverhill Bridge Proprietors vs. County Commissioners, 103 Mass., 124; s. c., 4 Am. Reports, 519; McAulay vs. Vermont Railroad Company, 33 Vermont, 311; Stacey vs. Vermont Central Rail-

---

Moody et ux. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

road Company, 27 Vermont, 39; Piscataqua Bridge vs. N. H. Bridge, 7 N. H., 35 Pet of Mt. Wash'n. So. Co., 35 N. H., 134; Bristol vs. New Chester, 3 N. H., 524, 535; Eastman vs. Co., 44 N. H., 150; San Mateo Water Works vs. Sharpstein, 50 Cal., 284; Sanborn vs. Belden, Judge, 51 Cal., 266; Vilhac vs. S. & I. R. R. Co., 53 Cal., 208; Cairo and Fulton R. R. Co. vs. Turner, 21 Ark., 494; People *ex rel.*, D. & S. R. R. Co. vs. McRoberts, 62 Ill., 38; People *ex rel.*, vs. Williams, 51 Ill., 63; Hall *et al.*, vs. People, 57 Ill., 309; 3 Stock., 106; 6 Hill, 61; 7 N. H., 70; Kennedy vs. M. & St. Paul Railway Company, 22 Wis., 581; Loop vs. Chamberlain, 20 Wis., 135.

*Fleming & Daniel* for Appellees, cited:

Declaration of Rights, sec. 8, (last clause,) Constitution of Florida, p. 4; Pierce on Railroads, 162; Pierce on Railroads, 163; Cooley on Constitutional Lim., 694; Mitchell vs. Maxwell, 2 Fla., 597; *Ex-parte* J. C. H., 17 Fla., 369; Pierce on Railroads, 164; Cooley's Const. Lim., (5th Ed.,) p. 697; 1 Redfield on Railways, (5th Ed.,) p. p. 296, 297, 298, 299, and notes 5, 6 and 7; Cairo & Fulton Railroad Co. vs. Turner, 31 Ark., 494; 25 Am. Reports, 564, 570; Bloodgood vs. The Mohawk & Hudson R. R. Co., 18 Wend., pp. 9, 16, 17, 18, 77; Fox vs. Western Pac. R. R. Co., 31 Cal., 538; Smith *et al.*, vs. Helmer, 7 Barb., 416; Gould vs. Glass, 19 Id., 190; Rexford vs. Knight, 1 N. Y., 308; Thatcher *et al.*, vs. Dartmouth Bridge Co., 18 Pick., 501; Tuckahoe Canal Co. vs. Tuckahoe Railroad Co., 11 Leigh, 77; Symonds *et al.*, vs. Cincinnati, 14 Ohio, 171; Hatch vs. Vt. Cent. R. R. Co., 25 Vt., 66; People *ex rel.* Green vs. Michigan Southern R. R. Co., 3 Mich., 496; Smith vs. McAdam, Id., 506; Rubottom *et al.*, vs. McClure, 4 Blackf., 305; Hankins vs. Lawrence, 8 Id., 266; New Albany and

---

Moody et ux. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

Salem R. R. Co., vs. Connelly, 7 Ind., 32; Hamilton vs. Annapolis and Elk Ridge R. R. Co. *et al.*, 1 Md., ch. 107 Commissioners, &c. vs. Bowie, 34 Ala., 461; Raleigh & Gaston Railroad Co. vs. Davis, 2 Dev. & Balt., Law, 451 - , Orr vs. Quinby, 54 F. N. H., 590; Ash vs. Cummings, 5 N. H., 591; 1 Redfield on the Law of Railways, p. 298, note; 1 Redfield on Railways, 277, 278; Pierce on Railways, 212; Cooley on Const. Lim., 702; Alabama and Florida Railroad Company vs. Burkett, 46 Ala., 578; 3 Mass., 307, 310; Baldwin, U. S. Circuit Court Report— (Eastern Dist. of Pa. and New Jersey,) pp. 229, 230; 1 Am. and Eng. R. R. Cases, p. 9; Mills on Eminent Domain, Sec. 89; Cooley's Const. Lim., p. 695, note 2; The People vs. Heyden, 6 Hill, 360, 361; Rixford vs. Kington, 11 N. Y., pp. 313, 314; Hooker vs. The New Haven and Northampton Co., 14 Ct., 146, (36 Am. Dec., 477,); Steve vs. The Proprietors of the Middlesex Canal, 12 Mass., 46; 1 High on Injunctions, sec. 622; 1 High on Injunctions, sec. 625; Perks vs. Wycombe, R. R. Co., 3 Gifford, 66; Gardner vs. Newburgh, 2 Johns. Ch., 161; (7 Am. Dec., 526); Pumpelly vs. Green Bay Co., 13 Wall., 178; North Pac. R. R. Co. vs. Barnesville and Moorehead R. R. Co. *et al.*, (U. S. Ct. Ct., North Dist. of Minn.,) 1 Am. and Eng. Ry. cases, p. 8; Mad. Av. Baptist Church vs. Baptist Church in Oliver Street., 73 N. Y., 95; Henderson vs. The N. Y. C. R. R. Co., 78 N. Y., 438; Cooley's Const. Lim., p. 218; Cooley on Const. Lim., pp. 221, 222; Cooley on Const. Lim., p. 219; Ogden vs. Saunders, 12 Wheat., 213; Adams vs. Howe, 14 Mass., 340; Kellog vs. The State Treasurer, 44 Vt., 256, 259; Slack vs. Jacobs, 8 W. Va., 612; Carpenter vs. Atherton, 25 Cal., 569; Metropolitan vs. Van Dyck, 27 N. Y., 460; People vs. Albertson, 55 Id., 54; Cotton vs. Commissioners, 6 Fla., 614; Morrison vs. Springer, 15 Iowa, 348; Stewart vs. Supervisors, 30 Id.,

---

---

Moody et ux. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

---

15; State vs. Cummings, 36 Mo., 277; Ash vs. Parkinson, 5 Nev., 35; Bridges vs. Shallcross, 6 W. Va., 570; Charles River Bridge vs. Warren Bridge, 6 Pick., 415.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The Jacksonville, Tampa and Key West Railroad Company, through Ambler and others, its agents and contractors, without the consent of the plaintiff, Mrs. Moody, and without previous condemnation of her land, had not only located their railroad over her land, but had entered upon it and were in the act of appropriating it to the construction of its road by felling trees, digging excavations and throwing up embankments. The court, upon the bill of plaintiffs setting up these facts, plaintiffs alleging also that they did not believe said corporation would have property that could be reached by a judgment at law for damages, enjoin the defendants from entering upon the land, and the corporation and its agents from felling trees, cutting excavations, throwing up embankments, or from proceeding with the building of the road on said land until the further order of the court. The corporation and its agents answering admit that after location of its line through the land described they have entered thereon with their laborers, that they have made some excavations and thrown up some embankments in the course of the construction of the said railroad, as the said road crosses the said lands within the limits of the statutory width allowed, and affirm a right to do so under the Laws of Florida and their charter. They admit that they have not paid for the said land or agreed to pay any specific sum therefor, and affirm that they have exhausted every effort to do so without success. They answer further, that anterior to the fil-

---

---

Moody et ux. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

---

ing of the bill proceedings to acquire title to so much of said land as is occupied by said railroad had been instituted, and that commissioners had been appointed under the statute to “appraise the compensation to be made to complainant, and that complainant, P. Moody, had actual knowledge and notice of these proceedings.” They say further, that since the filing of the bill plaintiffs have been served with notice, by the commissioners, of the place at which they would meet to consider the amount of compensation to which plaintiffs are entitled, and allege that the company is the owner of a franchise of great value, of about twelve miles of graded track in Duval county, and some iron, quantity not stated, soon to arrive to iron the same. They say further, that before the bill was filed they offered the complainants a good and sufficient bond as security to them for the payment of the compensation which may be awarded for the lands appropriated, to be determined by the commission. Defendants claim the right “to proceed with the construction of their road either before or after the commencement of or pending such proceedings in the Circuit Court for assessing the compensation to complainant,” but offer to give security for the payment of such compensation as may be awarded in the event such shall be held to be necessary, and also to comply with such equitable requirements as the court may direct and close their answer by stating that there is no case made by the bill, and by claiming the same benefit of this fact as if they had demurred to the bill. There is an affidavit accompanying the answer which gives particulars of repeated attempts to adjust the matter with plaintiffs. It more than sustains the answer.

Upon motion of defendants the court directed, “that the said injunction be dissolved upon the execution of a good and sufficient bond to be approved by this court, payable



---

Moody et ux. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

to the said complainants, in the sum of three thousand dollars, upon the condition that the said Jacksonville, Tampa & Key West Railroad will pay unto the said complainants the compensation to which they may be entitled for the *taking and appropriating*" (italics by this court) "by the said company, of any of the lands of the complainants in their said bill, mentioned by the award of the commissioners appointed or to be appointed to consider, ascertain and fix the same under the provisions of the act of the Legislature of the State of Florida entitled [an] act to provide a general law for the incorporation of railroads and canals," approved February 19, 1874. A bond approved by the Judge and executed by parties other than the corporation, purporting to be in accordance with this order, was filed and both parties treating the injunction as dissolved the plaintiffs appealed to this court. This case must be considered first with reference to the order granting the injunction, and second in reference to the order allowing its dissolution upon the giving of the bond required. An examination of this case as we have stated it, shows that the claim here made by this corporation and the claim adjudicated by the court was not a right of entry for the purpose of survey or location of the line of contemplated road, and that while the injunctive order first granted and subsequently dissolved was against any further entry, the further entry contemplated was one for the purpose of construction of the road and its permanent use by the company, such as is contemplated by the 4th sub-division of the act of the Legislature controlling the subject. This case, therefore, does not involve a decision of the question whether such corporation has the right of entry upon and passage over the land of plaintiff for preliminary surveys and location of the line of its road, which as is authorized by sub-division first of section ten of the statute referred to. Between the entry for construc-

---



---

Moody et ux. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---



---

tion and use and the entry for location and survey the statute itself makes a distinction. For the first, it contemplates compensation. For the latter, none is provided except such as is embraced in the final appraisement for the taking.

The first general question here involved is whether the corporation has the power to make a compulsory purchase of the land of the citizen for the purpose of carrying out the objects of its charter.

Under the power of eminent domain the sovereign may make a compulsory purchase of the property of the citizen when such property is to be appropriated to a public purpose or use, but such compulsory purchase, or taking as is called, cannot be made even by the sovereign "without just compensation." Such is the provision of our Constitution, which is a limitation upon all departments of the government. This, we understand, is not here denied; but if it were we should spend no time in hunting case of precedent to sustain a principle so universally admitted. Again, that which seeks to exercise this power here is a railroad company, invested with the usual franchises to be a corporation, to have the rights and duties of a common or public carrier with authority to construct a line of railway for the benefit of the public in affording additional facilities of passenger travel and freight traffic. That this is a public purpose and use for which the land of the citizen may, to the extent it is necessary to accomplish such public purpose be condemned, is also a legal proposition so well established in this country that it is certainly unnecessary to do more than state that such is the law. This leads us to the discussion of the true question in this case, and that question, in the language of the corporation here, is whether the act of the Legislature under which such claim is here made assures to the owner of the private prop-

---

---

Moody et ux. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

---

erty proposed to be taken the just compensation contemplated by the Constitution, as it is admitted that this corporation can be made the subject of the grant of a power to thus take the land, and that the proper department of the government to confer the power is the legislative department thereof.

Sections 14, 15, 16, 17 and 18, of chapter 1987, Laws, grant to the corporation the power to acquire titles to land required for its "purposes," as well as the manner of its exercise in a case of the character now before the court. The company is required to file a petition praying for the appointment of commissioners of appraisal by the Circuit Court, describing the land sought to be acquired, and after prescribing various proceedings, among which is notice and right to hearing by the parties interested, the act provides (sec. 17) that "the report of the commissioners shall be recorded by the Clerk of the Court, in whose office the same is filed in the judgment book of said court, and at any time after filing the same the railroad or canal company may pay to such owner or owners of the lands so taken, or to the clerk of said court, for the use of said owner or owners, the amount awarded by said commissioners, and if necessary a writ of assistance shall be issued by the said Circuit Court to put such company in possession." This is the compensatory clause for the taking authorized. The act authorizes the company "to proceed with the construction and operation of the road, either before the commencement of or pending such proceedings in the Circuit Court, to obtain titles to the land along the line or route of its road, and there is no provision in the act authorizing the landowner to institute the proceeding. Other provisions of the act regulating proceedings to acquire titles, under circumstances not existing in this case, and which do not apply to it, are called to our attention by the appellee, but as they

---

---

Moody et ux. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

---

do not control this proceeding or upon their face, or according to their plain letter and intent, purport in any manner to affect the present case it is only necessary to mention the character. These sections prescribe a method of proceeding, where the company shall not have acquired title land upon which "they have constructed their track," or if after attempt to acquire title, the title "attempted to be acquired is defective," or the title is in a trustee of an infant or idiot without power of sale.

From this recital of the provisions of the act it is seen that so far as the matter of making compensation to the owner is concerned, the statute requires nothing more than that "*the report of the commissioners shall be recorded by the Clerk of the Court in whose office the same is filed in the judgment book of said court.*" It is said that this amounts to judgment of the court. We do not think that this is so. We think, looking to this statute as an entirety, that the Legislature, in directing the recording of this award in the judgment book, did not intend to make it a judgment and more than a direction to record it in the deed or execution book would have manifested an intention to make it a deed or execution. Not only is this so, but the provision that the corporation may at any time after filing the award pay the sum awarded to the owner, seems to contemplate no process by which any judgment before the taking is consummated by absolute appropriation can be enforced at the instance of the land owner, and we think it clear from the terms of this section (17), and the provision in section 16 which provides that the corporation may proceed with the "construction and operation of its road," that is to a complete taking, even before the filing of the petition to ascertain the damage, that the Legislature contemplated here nothing except what it in words expressed; and acting upon the idea that the corporation would pay after the filing of

---

---

Moody et ux. v. J. T. & K. W. R. B. Co.—Opinion of Court.

---

---

the report fixing its amount, it did nothing more than “fix any time” after such filing as the date upon which it might do so. Where is the authority in this statute or elsewhere for the clerk, after recording the report in the judgment book, all that the law directs, to follow such record with a *consideratum est per curiam* against the corporation as to the damages awarded? It is true as contended by the corporation here that the 14th section of the act provides that from the time of filing the petition the proceedings shall be considered a suit pending in the Circuit Court of such county, and to the extent that such proceedings as prescribed can be given effect as judicial proceedings, we will do so. Such is our duty. But surely, if we go beyond this, if we add to the plain terms of the law and authorize other and additional proceedings, and those, too, of the most important character, do we not become to that extent legislators, and in effect add to and amend this statute? Judicial legislation, to the extent that it exists anywhere, when clearly shown, is usurpation, and there is no more important organic limitation viewed in any respect than that which in unmistakable terms says, to judicial tribunals, you shall not exercise the functions of the legislative department of the government. The simple filing of a report of the commissioners, whether it be in one book or another, does not in any sense amount to more than *ascertaining* the amount of compensation or fixing the amount of the claim or debt. A taking of private property upon such simple finding of the amount of compensation due is clearly a “taking of private property without just compensation.”

In view of the fact that our conclusion is the same, viewing this case in such aspect, and in view of the additional fact that this case has been argued in that light, we will, however, treat this filing of a report as equivalent to a judgment for the land owner.

---

Moody et ux. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

The question then is, is a judgment against a corporation, with the right to have execution thereof, a just compensation to the land owner for the taking of his land for construction of the road of the corporation and its appropriation to its use?

Chancellor Kent's view seems to be that the indemnity should, in cases which would admit of it, be previously and equitably ascertained, and be ready for reception concurrently in point of time with the actual exercise of the right of eminent domain. 2 Kent's Commentaries, 339, noted by Mr. Justice Cooley, in his work on Constitutional Limitations, (5 Ed., p. 697) says: "On general principles it is essential that an adequate fund be provided from which the owner of the property can certainly obtain compensation. It is not competent to deprive him of his property and turn him over to an action at law against a corporation which may or may not prove responsible and to a judgment of uncertain efficacy. For the consequence would be in some cases that the party might lose his estate without redress in violation of the inflexible maxim upon which the right is based."

In the case of Thompson vs. The Grand Gulf Railroad and Banking Company, (3 How., Miss., 249) one of the questions involved was whether a judgment was compensation within the meaning of the Constitution of that State. Chief-Justice Sharkey there says, "the judgment in this case is not compensation. A judgment is but a security for compensation, or satisfaction, which may or may not prove productive. In principle there is no difference between a judgment and a bond except that one is a security of a higher nature than the other. Suppose the Legislature had said that the railroad company should give bond for the payment of the damages assessed, could it be said to be a compensation? And yet it might be quite

---

Moody et ux. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

available as a judgment.” It is true that the Constitution of Mississippi, in force at the time this opinion was rendered, differed with ours in that it required that compensation should be “*first*” made, but it is plain that this difference does not render inapplicable here this definition of compensation, as it is given without reference to the time at which it was to be made. What is said is that “the judgment is not compensation.”

Could language more completely cover a case than this language of these two eminent jurists does the present controversy? If the statute is construed to establish a claim or debt and leave the party to his action, this clearly is insufficient, and if it gives a judgment the party might lose his estate without redress. It must be borne in mind, too, that the statute with this construction does not leave the question of solvency or insolvency of the corporation open for inquiry. It permits nothing of the kind. Under this construction any corporation, whether it be solvent or insolvent, whether all of its franchises and all of its property, owned at the time of taking the property of the citizen, and to be thereafter acquired, including the identical property taken, is or is not subject to a first mortgage equal to its full value, the citizen must accept the judgment against it as the just compensation of which the Constitution says no power in the government shall deprive him. We have no doubt at all that that portion of the statute which authorizes the taking of private property and which we have been considering is unconstitutional and void. Under these circumstances our duty is to enforce the Constitution, the common superior of Legislatures and judicial tribunals, and disregard the statute to the extent indicated. As to any other part of it we say nothing.

We leave this branch of this case with an allusion to a case to which our attention is especially called by the cor-

---

---

Moody et ux. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

---

poration here. The case is *Bloodgood vs. The Mohawk and Hudson Railroad Company*, 18 Wend., 17. Chancellor Walworth in this case, in his comments upon the exercise of the power of eminent domain by the State or its agents addresses his remarks in one place to the exercise of the right of eminent domain by the State or its agents for the purpose of making public highways or for the purpose of the State canals. He there says that the "compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided, and upon an adequate fund whereby he may obtain such compensation through the medium of the courts of justice if those whose duty it is to make such compensation refuse to do so." He then gives as an illustration of his views the remedy in a case where the town or county or State officers refuse to do their duty "in ascertaining, raising or paying such compensation in the manner prescribed by law," which he says is "by mandamus to compel them to perform their duty," holding that "the public purse or the property of the town or county upon which the assessment is to be made may justly be considered an adequate fund." When, however, he comes to consider the case before him, which was trespass *quare clavi fregit*, the alleged trespass being a breaking down of plaintiff's fences, destroying his trees and digging up his land (which is the injury in this case) his response to a plea justifying under defendant's act of incorporation without averring that the damages had been regularly assessed and paid, or deposited in bank to the credit of the owner before entry and appropriation as required by the charter, his language fully sustains the conclusions we have reached. He says "the citizen whose property is taken from him without his consent is not bound to contribute to the solvency of an individual or even of an incorporated



---

Moody et ux. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

company, for corporations as well as individuals are sometimes unable to pay all their just debts, especially those corporations which are authorized to incur heavy responsibilities," (and the defendants here is one of that kind) "in anticipation of the payment of their capital by the subscribers for the stock, and if the true construction of this charter was such as is contended for by defendant's counsel," (which was that it authorized the acts complained of before payment for the land) "I should hold that the provision which authorized the appropriation of the plaintiff's property to the use of the corporation before the damages had been ascertained and paid was unconstitutional and void." This is what we have been constrained to do here. While the construction of this road is a matter of great importance to a large number of our people, our plain duty requires us to say, as Chancellor Walworth says he would have been constrained to say of a similar act, that the provision authorizing an appropriation of plaintiff's property here is unconstitutional and void.

We think, therefore, that the granting of the injunction was proper. The only other questions existing in this case, as it was submitted, arise out of the order of the Chancellor dissolving the injunction upon the coming in of the answer of defendants. From the statement of the case it is seen that the court dissolved the injunction thus granted upon the execution of the bond approved by the court, the condition of the bond being that the corporation would pay to complainants the compensation to which they may be entitled for the *taking and appropriating by the said railroad company of any of the lands of complainants* to be thereafter ascertained under the statute. The result of this action is that a re-entry against the will of the owner and for the purpose of appropriation is authorized upon the giving of a bond of the character named. Could the plain-

---

Moody et ux. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

tiffs recover in an action upon this bond? As a statutory obligation it is void. Could it be regarded as an obligation at common law? See *Vilhac vs. S. & I. Railroad Co.*, 5 Cal., 212. The court thus in the absence of any act of the Legislature authorizing this company to exercise the right of eminent domain, in other words to take the property of plaintiff against his will, authorizes it to do so, and that too without just compensation, for as we have seen neither bond nor a judgment of this kind answers this requirement of the Constitution in this particular. The rule that a court of equity having acquired jurisdiction for one purpose may exercise it to the doing of full equity between the parties, has no application here. This matter is controlled by principles much more elementary and important than those which concern the mere rules of remedial practice in equity. The right of compulsory purchase under the Constitution does not attach to all corporations organized for a public purpose any more than it does to individuals who propose to accomplish a like public purpose, and a court of equity independent of legislative grant to such corporation or individual can no more designate or authorize the corporation to exercise such power than it can an individual having no corporate powers of any character. It can no more grant here this right of compulsory purchase than it can the franchise to be a corporation. The designation of the corporation or individual to exercise this power, the granting of the right of compulsory purchase and the requirement to make and the method of making just compensation, are all legislative "functions," and in the absence of legislative action authorizing these acts the courts are powerless, either through the instrumentality of injunctions granted or dissolved or otherwise, to authorize the exercise of such powers. In proper cases the court may and must construe the Constitution, and determine

---

Moody et ux. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

where the right of the land owner is involved, whether such power has been conferred by the Legislature upon a corporation in a constitutional method, and to see that it is properly executed if such method is prescribed. With that our power ceases, for if it is not thus given to the corporation we cannot give it, any more than the Legislature can enter a judgment in proceedings other than those embraced within its specially granted judicial powers, such as impeachment and trial of an officer of the government under certain circumstances. This (the granting of the right of compulsory purchase) is clearly a purely legislative function, and the Constitution, Article III, provides that, "no person properly belonging to one of the departments" of government "shall exercise any functions appertaining to either of the others except in those cases expressly provided for by this Constitution." In the absence of legislation granting the power the right of the land owner is precisely such as exists without any legislation on the subject, constitutional or otherwise, except perhaps in some matters of tort, and he may seek his remedy at law or in equity, as the nature and extent of his injuries require, and the remedial law and practice of the courts of common law and equity justify and authorize. Surely a court of equity cannot say to the land owner you shall submit to a trespass; you shall part with your land whether you desire to do so or not, at a price which commissioners may value it at, and that too in a case instituted by the land owner praying protection from this very act of illegal appropriation. The last order in this case, bearing date the second day of June, A. D. 1883, and all orders herein made are set aside, except the injunction granted upon the filing of the bill, and that will be revived to continue until the further order of the court, or until the corporation may be granted the right of compulsory purchase of the

---

State ex rel. v. J. T. & K. W. R. R. Co.—Syllabus.

---

land of the plaintiff by the proper authority, and just compensation is made to him therefor upon its legal condemnation to the use of the company.

The case is remanded for such proceedings as are consistent with the opinion herein rendered, and the principles of equity.

**REPORT.**

---

THE STATE OF FLORIDA, EX REL. PARAN MOODY ET UX., vs. JAMES M. BAKER, CIRCUIT JUDGE, AND THE JACKSONVILLE TAMPA AND KEY WEST RAILROAD COMPANY, RESPONDENTS.\*

1. A section or a part of a section of a statute providing a method of a corporation of exercising the right of compulsory purchase of land may be unconstitutional. If, however, there are sufficient independent provisions constitutional in their character to provide a complete method of proceeding, effect will be given to such last named portions of the act and the condemnation authorized.
2. Section 20 of chapter 1987, being the general statute for the incorporation of railroads in this State, in so far as it authorizes a railroad company which has not acquired title to land upon which it has constructed its track to have an appraisal for the damages done to the owner thereof to remain in possession during the pendency of the proceedings, and to have a stay of all actions pending against the company on account thereof on such company paying into court a sufficient sum to pay the compensation therefor when finally ascertained, is constitutional. The rights of the several parties under this section, so far as it controls this case, determined. So also is there sufficient and adequate means to ascertain the value of the land constitutionally prescribed and fixed by the 14th section of the same act.

---

[\*This case was decided at the June term, 1884. In view of its relation to the case immediately preceding it in this volume, it is inserted here.—REPORTER.]

---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

---

3. The mode or method of exercising the right of eminent domain in the absence of any provision in the organic law regulating it is within the discretion of the Legislature. The limitation is that it shall be exercised for a public purpose, with just compensation; and vesting the power of ascertaining it in a court and appraisers, is constitutional. It is not necessary that the owner shall have the right under the act to institute the proceeding to condemn the property, or that his right of action should be increased.
4. In cases of actions by land owners against railroad companies, the Legislature has the power to prescribe reasonable rules, staying such as seek to dispossess the company pending constitutional proceedings of condemnation by it.
5. Prior occupation of the land without authority of law even though it be a trespass, will not preclude the company from taking subsequent measures authorized by law to condemn the land for its use.
6. This court will not issue a writ of prohibition to the Circuit Court when it is acting within its constitutional powers in the enforcement of the constitutional provisions of the act above named.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

*Edward M. L'Engle* for Relators.

I. The suggestion upon which the rule to show cause was ordered recites, by way of introduction, the history of the subject matter concerning which the alleged usurpation of jurisdiction is attempted, and then suggests that the Judge of the Circuit Court of the 4th Circuit is about to give force and effect to so much of the act of 1874, chap. 1987, as provides for the exercise by private corporations of the right of eminent domain, which portion of the said act the relators claim to be unconstitutional, and that the proposed attempt to give effect thereto is consequently a usurpation of jurisdiction by said Judge and court.

The prayer is for a writ of prohibition to prohibit the

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

Circuit Court and the Judge thereof from appointing any commissioners under said act for the purpose of appraising or condemning the relators' land for the use of said corporation and from doing any other act under said statute to uphold or enforce any alleged claim by said corporation that it has the right of compulsory purchase of relators' land and from in any wise violating the mandate of this court which was issued in the cause mentioned in the introductory portion of the suggestion.

The Circuit Judge is prevented by severe illness from making any return.

The railway company by way of return filed a demurrer and an answer which stand as pleas.

The relators join issue upon both pleadings.

As to the demurrer:

The first ground assigned is that a transcript of all the proceedings mentioned in the suggestion wherein acts of usurpation are declared to be about to be committed do not accompany the suggestion.

We answer that this is not ground for demurrer. And that if it be under any circumstances a good ground it cannot be assigned here because the supposed deficiency does not appear by the suggestion itself.

On the contrary, the suggestion alleges that a transcript of all the proceedings in the case duly certified accompanies the suggestion, which I now further say is a true and correct allegation.

The second ground of demurrer is that the proceedings suggested as an act of usurpation about to be committed by the Circuit Court is not opposed to the judgment of the Supreme Court lately rendered upon the statute under which the authority to do the act complained of is claimed by respondent to exist. *But on the contrary is within the jurisdiction and power of the said Circuit Court.*

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

This ground of demurrer is identical with the matter set **up** by way of answer (pleas) as cause why the writ should **not** issue as prayed, and will be discussed with it.

The third ground of demurrer is that the suggestion it-**self** discloses that the relators have a full and complete rem-**edy** by appeal.

The suggestion is that the Judge of the Circuit Court is **about** to proceed to enforce an unconstitutional statute. **O**f course if the statute is unconstitutional judicial action **under** it would be a usurpation of power, and the writ of **prohibition** would be the proper remedy.

Proceedings by prohibition are an appropriate method of **enquiring** into the constitutionality of a statute and of judi-**cial** action under it. *Harriman vs. Co. Com'rs*, 53 Maine, 83; *Sweet vs. Hurlbert*, 51 Barbour, 312; *So. Ca. R. R. Co. vs. Ells*, 40 Georgia, 87; *People vs. Works*, 7 Wendell, 487; *Quimbo Appo vs. The People*, 20 N. Y., 531.

The constitutionality of a statute may be inquired into **and** determined in mandamus proceedings. *People ex rel. D. & S. R. R. Co. vs. McRoberts*, 62 Ill., 38; *People ex rel. vs. Williams*, 51 Ill., 63. Why not, then, in prohibition proceedings, which are the counterpart of the other? *High on Extraordinary Remedies*, §763.

The fourth ground of demurrer is that the suggestion **does not** contain facts sufficient to support the prayer of the relators.

Our remarks and authorities on the 3d ground of demur-**rer** are applicable also to this one.

The answer of the respondents, 1st, denies the allegation of the suggestion, to wit: that this court has decided that that portion of the said statute which authorizes the tak-**ing** of private property for public use is unconstitutional and void.

2d. It avers that this court confined its judgment to the

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

17th and a part of the 14th sections of said act, and the respondent claims the right to proceed under the 20th section, as to which this court has made no decision.

3d. It avers that the proceedings complained of and suggested as ground for writ of prohibition are in harmony with the judgment of this court *and within the jurisdiction of the Circuit Court.*

These three denials and averments in the answer and the 2d ground of demurrer raise the whole merits of the controversy, to wit:

1st. Whether or not this court has decided that that portion of the statute which authorizes the taking of private property for public use is unconstitutional and void.

2d. If the judgment of this court already rendered and its opinion do not practically embrace the 20th section, does that section warrant the exercise of the jurisdiction claimed for the Circuit Court.

As to the first point I shall not undertake to interpret for this court its own opinion and decree. But, in vindication of the interpretation which I put upon them, (*viz:* that they completely annihilate all that portion of the statute which authorizes the taking of private property for public use) I cite from *Moody and Wife vs. The Jacksonville, Tampa and Key West Ry. Company et al.*, Head Note 5: "The court had no power to authorize a compulsory purchase," &c. "So much of chapter 1987 of the Laws as proposes to vest in railroad corporations the right to condemn property and to fix the compensation to be made, construed." *Ib.* opinion: "This leads us to the discussion of the true question in this case, and that question is whether the act of the Legislature under which such claim [of the right to exercise the power of eminent domain] is here made assures to the owner of the private



---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

---

property proposed to be taken the just compensation contemplated by the Constitution.”

Ib. opinion: “We have no doubt at all that that portion of the statute [sections 14, 15, 16, 17 and 18] which authorizes the taking of private property and which we have been considering is unconstitutional and *void*.”

Ib. opinion: “Our plain duty requires us to say, as Chancellor Walworth says he would have been constrained to say of a similar act, that the provision authorizing an appropriation of plaintiffs’ property here is unconstitutional and *void*.”

Ib. opinion: “The court thus, in the absence of any act of the Legislature authorizing this company to exercise the right of eminent domain, authorizes it to do so.”

Ib. decree: \* \* \* “All orders herein made are set aside except the injunction granted upon the filing of the bill and that will be revived to continue until \* \* \* the corporation may be granted the right of compulsory purchase of the land of the plaintiff by the proper authority and just compensation is made to him therefor,” &c.

With these questions I pass to the second point, viz: If the judgment of this court already rendered, and its opinion do not practically embrace the 20th section, does that section warrant the exercise of the jurisdiction claimed for the Circuit Court, and shall discuss it first from the standpoint of the respondent, viz: that the section undertakes to confer the jurisdiction. Which is not my opinion, as I show further on.

That section says: “In any case when a railroad \* \* company shall not have acquired title to any land upon which it has constructed its track, \* \* \* the company may proceed to acquire \* \* \* such titles in the same manner as if no appraisal had been made.”

That is the whole of the provision of this section which

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

attempts to confer upon the respondent (as claimed by it) the right of compulsory purchase of private property.

Railroad and canal companies, under the circumstances mentioned in this section, may, the section says, do what this court has said they cannot do and in precisely the manner which this court has condemned and by the identical questions and provisions of the statute which this court has declared to be unconstitutional and void. If void, those preceding provisions cannot by reference to them be made to exist to serve a purpose elsewhere in the act.

The principles and reasoning which make them unconstitutional and void in the sections where they are found in the very words, apply with equal force to them in the 20th section where they are found only by reference.

The section after providing in the above words for, (as the respondent claims,) the compulsory purchase of lands (and the above is the whole of the provision on the subject) further declares that at *any stage* of such proceedings the court shall again violate the Constitution by allowing such corporation to take and keep private property without making just compensation.

Not satisfied with this, the section goes on to say still further that if when the court has obeyed the above mentioned imperative command any actions or proceedings should be instituted against such company\* on account of its taking and keeping of private property in defiance of the constitutional prohibition the court may stay them on the condition that such company either pay into court a sum of money or give security as alternatively the court may direct (the sufficiency of the sum of money or of the

---

[\*Note.—If the taking or keeping be lawful, no action would be instituted against the company. 7 N. H., 70, 72.]

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

security to be determined *by the court*) to pay the compensation for such real estate when finally ascertained.

This money or security be it noted is not provided by that portion of the statute which attempts to give the right of compulsory purchase and regulate its exercise and is not provided absolutely and in any event for the production of the land owner to pay his “just compensation,” but is provided only as a condition upon which the court may stay actions and proceedings against the company for its trespass.

But let us extend the operation of the condition as far as the most liberal construction can ask. The section would then read thus: “And at any stage of such new proceedings the court *shall authorize* the corporation, if in possession, to continue in possession, and if not in possession, to take possession and use such real estate during the pendency of such new proceedings,” provided, such company pay into court, &c \* \* \* “And” (at any stage, &c., the court) “may stay all actions or proceedings against such company on account” of its unlawful taking of private property, provided such company pay into the court, &c.

But this reading of the section does not help it. It is as unconstitutional by this rendering as it is by the other.

The statute cannot, under the Constitution, authorize a corporation to take or keep possession of private property 'till just compensation has been made or authorize a court to refuse its remedies, when invoked, for such unlawful acts. Consequently that state of facts cannot exist, in view of which the sum of money is to be paid into court or security given, and neither of those conditions can ever be imposed or demanded.

A provision in the Laws of Wisconsin similar to this

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

20th section, has been passed upon by the Supreme Court of that State. 80 Wis., 105.

Its decision sustains the view taken of this 20th section, by me in brief filed in the case of *Moody and wife vs. The Jacksonville, Tampa and Key West Railway Company et al.*, decided at the last term of this court, and which I now re-iterate, viz: that this 20th section applies “only to cases where a court of equity without this statutory provision and on general well established principles would relieve against actions by a land owner who had permitted corporation to appropriate his land and construct its track or canal thereon, or who had acquiesced in its defective proceedings for condemnation or had voluntarily given title which proved defective.” *Laws of Wisconsin, 1861*, chap. 175; *Bohlman vs. G. B. & L. P. Ry. Co. et al.*, 30 Wis. R., 105; *Burns vs. W. & M. R. R. Co.*, 9 Wis., 450; *McAuley vs. W. V. R. R. Co.*, 33 Vermont, 311; *Carson vs. Coleman*, 3 Stockton, 106; *Pisataqua Bridge vs. N. H. Bridge et al.*, 7 N. H., 70.

The interpretation of the 20th section contended for by the respondent would require that a trespass should be committed in order to take advantage of its provision. An unoffending corporation could not proceed under it.

The whole case and argument of the respondent, as the exhibits attached to its own pleadings show, are founded on a violation of property rights, a gross and flagrant trespass without which it could have had no opportunity of invoking the 20th section.

It claims that by its wrong-doing it is in a better position under the law than it could have been if innocent of wrong. That is the true meaning of its argument. There is no escape from it and such an argument makes the provision of the 20th section amenable to the criticism with which this court closes its opinion in the case of *Moody vs. R. R.*

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

**Co., supra.** “Surely a court of equity cannot say to a land owner: you shall submit to a trespass; you shall part with your land, whether you desire to do so or not, at a price which commissioners may value it at, and that too in a case instituted by the land owner praying protection from this very act of illegal appropriation.”

**II.** The respondent corporation raises the point that “there has been no effort to obtain relief in the court below,” and asks the court for this reason “to consider *in limine* whether it will grant the extraordinary remedy.”

The rule is in regular suits, when there are parties and pleadings before the court, that any alleged usurpation of jurisdiction by the court must be brought to its attention in order that it may have an opportunity of receding from its position. But this rule does not hold in such irregular and anomalous proceedings as that in which the usurpation here complained of is suggested as occurring. That is purely an *ex-parte* proceeding; there are no pleadings and no citation of the land owner before the Circuit Judge. The land owner has no right to be heard. It is no more incumbent on him than it is on any other citizen to advise the court to pause and reflect whether it has authority to grant the *exparte* petition of a corporation. The statute gives the land owner no opportunity of having any knowledge until after the court has exhausted its power by appointing the commissioners. There is no provision for any proceedings by which the land owner may bring any such question or any other question before the court.

Heretofore in discussing the 3d ground of demurrer, I cite reported cases which arose upon proceedings similar to the proceeding under our statute, chapter 1987. The court made no such requirement in any of them as this respondent now asks this court to make.

---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

---

In *Quimbo Appo's* case, 20 N. Y., the States Attorney refused to appear to the motion in which the court proposed to exercise the questioned authority but resorted at once to the appellate court for prohibition, which was granted.

But the fact is that the court heard long argument upon the very point of the jurisdiction claimed for it, the defect of jurisdiction having been brought to its attention by the relators here in the only mode open to them. This is shown by the exhibits filed with pleadings in this application. Can it be said that the question of jurisdiction was not squarely before the court below in the argument to which its opinion, filed in this proceeding, refers?

Was there any other question before it? Was not that the only question? And does not the court treat of that only in its lengthy opinion sustaining the constitutionality of the statute and therefore sustaining its jurisdiction?

If this court should think that the proceeding complained of was of such a character as allowed a remedy being sought in the court below by in some mode calling the court's attention to its proposed usurpation, and that the suggestion should contain the allegation that it was done; then we say, as above, that the court's attention was elaborately and emphatically called to its lack of jurisdiction, and that the fact appears in the record before this court. And we further say that as to the absence of such allegation in the suggestion it can be raised only by demurrer, and that the suggestion is amendable in this as in other particulars.

That the whole case, pleading as well as merits, was submitted to this court upon the understanding of counsel and the intimation of the court that technicalities would not be allowed in any manner to embarrass the discussion by counsel, or the consideration by the court, of the vital ques-

---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

---

tions involved, which were and are: 1st. Has this court already decided against the power claimed for the Circuit Court? 2d. If not, has the Circuit Court such power and jurisdiction? 3d. Is an application for prohibition a proper method of determining whether or not the jurisdiction claimed for the Circuit Court exists? But for such understanding and information we would have required the demurrer to be argued and determined first and would have had the pleadings settled and perfected before submitting the case on the merits so that only the main questions could have been considered upon the final argument. If the court should, nevertheless, think there is a material defect in the suggestion in the respect indicated we ask leave in view of all the circumstances to amend instantly without prejudice to the status of the case.

This proceeding is not governed by technical rules. The courts consider each case upon its own merits and grant or refuse the writ as may be proper under the circumstances. *Quimbo Appo's case, supra*; High on Extraordinary Remedies, §765.

In the brief filed for appellant in the case of *Moody & Wife vs. The J., T. & K. W. Ry. Co. et al.*, I discussed to some extent the 20th section of the act, ch. 1987. I now adopt for the purpose of this case as much of that argument as is applicable here, and quote therefrom as follows:

“It has been contended that if the provisions of the statute would be otherwise unconstitutional the objection of no security for payment is cured by section 20 when it says that ‘at any stage of such new proceedings, &c., &c.’ But the construction which I have given above to this section is the only one which will save it from being itself unconstitutional because otherwise the statute would provide in express words that when a land owner resorts to his common law right of action to repel, restrain or get dam-

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

ages for an unlawful taking of his property, the courts may stay him and compel him to accept such security as the court may direct.

“This would not be a proceeding by the law of security for the compensation for the taking of private property. It would be remitting the land owner to his legal remedy, (and that the authorities say is not just compensation) which, when invoked, the courts may stay. The statute does not establish the security. On the contrary, it compels the land owner to go into the courts to get what they may choose to give him. The construction of the statute contended for by the other side would provide a commission to ascertain the compensation, that is the value of the land and the amount of the damages, and would at the same time, by allowing the court to fix the amount of the security, substitute the judgment of the court as to what that value and amount should be.

“Section 20 cannot refer to the taking under section 14 and be a part of the proceedings then provided for because if the taking and those proceedings are constitutional, ‘no actions or proceedings’ on account thereof could be had by the land owner. He would be confined to the remedy provided by such statute.” *Heninker vs. Contoocook Valley R. R. Co.*, 29 N. H., (9 Foster) 152, and authorities cited; also *Brown vs. Beatty*, 34 Miss., 243-4, and authorities cited.

“If the statute does not provide a means of getting compensation other than ‘actions or proceedings,’ which the court enjoin, it is not constitutional. This is a crucial test 50 N. H., 616.”

Discussing the 20th section again from the standpoint of the respondent I further say that if the condition upon which the court is permitted or commanded to act be held to apply so that the section would read thus: “And at any



---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

stage of such new proceedings the court shall authorize the corporation, if in possession, to continue in possession, and if not in possession to take possession and use such real estate during the pending of such new proceedings on such company, paying into court a sufficient sum or giving security, as the court may direct, to pay the compensation therefor when finally ascertained," and if all other objections which I have raised to its constitutionality be held bad, and the money or security named by the court be held to be that contemplated by the constitution instead of what I say it is, I still say that the section would be unconstitutional because provision for the payment of the land owner would not be certain, absolute, prompt and necessarily sufficient.

The court might require a much less sum to be paid into court or secured than the commissioners might find the land owner entitled to and there would be no redress.

Again. The corporation may, by simply filing its petition, put the law in operation and get possession or be continued in possession of the land, and might never proceed any further so as to enable the land owner to get his money, the statute not allowing him to be the actor therein. For this reason, if for no other, the statute is unconstitutional. *B. B. & C. R. R. Co. vs. Ferris*, 26 Texas, 601; *Walther vs. Warner*, 25 Mo., 277; *White vs. N. & N. R. R. Co.*, 7 Heisk., (Tenn.) 518, and other authorities cited in my brief above referred to upon this proposition.

*Note.*—The brief referred to cites the above and numerous other authorities in support of its three main propositions of which the above is one. I have no access at this time to the authorities and am unable to recollect or otherwise distinguish which other of the said authorities are applicable to the proposition last above propounded. This

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

must be my apology for referring to cases some of which may not be pertinent.

*Fleming & Daniel* for the Railroad Company.

This cause comes on for hearing on the demurrer and answer of defendants to the rule to show cause issued by this court on the filing of the suggestion of plaintiffs.

But before entering upon the discussion of these questions we ask the court to consider whether it will grant the extraordinary remedy when there has been no effort to obtain relief in the court below.

“Where there has been no effort made to obtain relief in the court which it is sought to prohibit, the Superior Courts will refuse to exercise their jurisdiction by this extraordinary remedy.” High on Extraordinary Remedies, 2d Ed. sec. 773, citing *Ex-parte* McMeechin, 12 Ark., 70; *Ex-parte* City of Little Rock, 26 Ark., 52; *Ex-parte* Hamilton, 51 Ala., 62; State vs. Judge of 5th Dist. Court, 29 La. An., 306; Hudson vs. Judge of Supreme Court, 42 Mich., 239; South Pac. R. R. Co. vs. Sup. Court, 59 Cal., 471.

If it is asked what effort could be made to obtain relief in the court below, counsel for plaintiffs contends that the proceedings sought to be prohibited have no connection with the equity suit. If it is a separate suit no question has been made in it as to the right of the Circuit Court to entertain the petition. Certainly all questions which could arise in a suit could be raised by demurrer or answer to the petition and the inferior court would be obliged to pass upon them.

Passing to the questions raised by the demurrer and answer:

As to the first ground of demurrer that a transcript of

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

all the proceedings do not accompany the suggestion and writ, no transcript accompanied the copy of the suggestion sent to defendants. On examining the transcript on file in this court, a copy of all the record appears excepting copies of the motion, which being sufficiently embodied in the order of the Circuit Judge reviving and dissolving the injunction, we do not insist upon this ground.

The second ground of demurrer is that the petition of the Jacksonville, Tampa and Key West Railway Company and the proceedings contemplated thereon, as suggested by the relators or plaintiffs, as the applicants for the writ are called in the statute, are not opposed to the judgment of the Supreme Court in the case of Paran Moody and wife against the Jacksonville, Tampa and Key West Railroad Company decided at its last January term and are within the jurisdiction and powers of the Circuit Court of the Fourth Circuit of Florida for Duval county.

This ground of demurrer is in substance the same defence that is made in the answer in the words following: "This respondent answering denies that the Supreme Court, by its judgment and decree rendered at the last January term in the case of Mary L. Moody and Paran Moody against the Jacksonville, Tampa and Key West Railway Company, as suggested by the relators, decides that that portion of the said statute, to wit: chapter 1987, Laws of 1874, approved February 19th, 1874, which authorizes the taking of private property for public use, is unconstitutional and void," but on the contrary, this respondent doth aver that the Supreme Court, by its said judgment and decree, decides only as to the constitutionality of section 17 and a part of section 14 of said act, and did not make any judgment or decision as to the constitutionality of the 20th section or other parts of said act on which rests respondent's petition of the 14th day of June, 1884, and the pro-

---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

---

ceedings thereon. We will consider this point as set up in the demurrer and answer together. We understand the decision of this court as rendered in the case of *Moody and wife vs. The Jacksonville, Tampa and Key West Railway Company*, as the Circuit Judge does, and we adopt his exposition and argument. Read Judge Bakers's opinion filed June 23d, 1884.

In this opinion the Circuit Judge gives his reasons for the conclusion, that the whole law was not declared unconstitutional, and that the 20th section is in force, and in the present situation of the parties provides a constitutional mode by which the lands can be retained and the title acquired by the railroad company, and the plaintiff, Mrs. Mary L. Moody, a sure mode of payment for the land.

Said section is in words following, to wit:

“Sec. 20. In any case where a railroad or canal company shall not have acquired title to any land upon which they have constructed their track or canal, or if at any time after an attempt to acquire title by appraisal of damage or otherwise it shall be found that the title thereby attempted to be acquired is defective, the company may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceeding the court shall authorize the corporation, if in possession, to continue in possession, and if not in possession to take possession and use such real estate during the pendency of such proceedings, and may stay all actions or proceedings against such company on account thereof, on such company paying into the court a sufficient sum or giving security as the court may direct, to pay the compensation therefor when finally ascertained. No injunction shall be granted until said compensation has been fixed and determined.”

This section we contend is adapted to and fits our case

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

and it is constitutional because it affords an adequate remedy to the land owner for compensation. Our constitution does not require pre-payment.

“In the absence of distinct provision in the constitution requiring the payment of compensation, such pre-payment need not precede an entry for the construction of a railroad, if some existing law affords an adequate remedy for obtaining it, and the provision is complied with if in the place of such pre-payment a deposit of a certain amount in court, or a bond with sufficient sureties, the amount and sufficiency to be determined by some impartial tribunal.” *Pierce on Railroads*, p. 64; *Cooley on Const. Lim.*, 5th Ed., 697; 1 *Rec. on Rys.*, 5th Ed., 296, 299, and notes 5, 6 and 7; *Cairo and Fulton R. R. Co. vs. Turner*, 31 Ark., 494; 25 *Am. Rep.*, 564, 567; *Bloodgood vs. The Mohawk & Hudson River R. R.*, 18 Wend., 9, 16, 17, 18, 277; *Fox vs. West. Pac. R. R. Co.*, 31 Cal., 538.

“When land is ‘taken’ for public use, land is not taken for public use in the sense in which the word ‘taken’ is used in the constitution, until the last act has been performed which, under the mode of condemnation adopted, is required to transfer the title or subject it to the servitude.” *Fox vs. The West. Pac. R. R. Co.*, 31 Cal., 538.

It may be said that the 20th section provides no mode of ascertaining the value of the land and therefore it cannot be used by the corporation.

“But there is no reason why the compensation to be made may not be ascertained by any appropriate tribunal capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power.” *United States vs. Jones*, 109 U. S., 519; *Kohl vs. The U. S.*, 91 U. S., 367.

But it is said that while this may be true in the case of

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

a sovereign power like the United States, the principle does not apply to a corporation.

It is no longer a question that land for a railroad is a public use. The right to take it is given by the State, and with the right is transferred all the power to take.

The question to be determined in this proceeding is the constitutionality of the said 20th section of the general act for the incorporation of railroads and canals.

This question was certainly raised in the equity suit by the decree reviving and dissolving the injunction rendered after the filing of the supplemental answer, and it could have been raised in the suit instituted when the petition was filed.

Was not ample remedy afforded the plaintiffs by appeal to this court from any judgment or decree of the Circuit Judge?

In all cases where the party aggrieved has an ample remedy by appeal prohibition will not lie. High on Extraordinary Remedies, (2d Ed.) secs. 770 and 771, and authorities cited in notes 1 and 2.

In the cases cited by plaintiffs to sustain the original jurisdiction of this court in considering constitutional questions it does not appear that these questions in the matters involved could have been determined by the inferior tribunal.

If the practice is established that the question of the constitutionality of a law arising in proceedings pending before a Circuit Court may be originally passed upon by the use of this writ, it may be very convenient and expeditious to those invoking its aid, but it would double the business of this court, and in our humble judgment it would not be in accordance with the best precedents.

The writ is not one of absolute right, and its use should be controlled and limited by the discretion of the court.

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

**II.** In reply to the brief of E. M. L'Engle:

It is contended by counsel for plaintiffs that proceedings of prohibition are the appropriate method of enquiring into the constitutionality of a statute and of judicial action under writ, and several authorities are cited to the point. This is undoubtedly so when there is no other remedy.

In the case cited from 53 Maine, *Harriman vs. The County Commissioners*, the court says there was no other remedy. 53 Maine, p. 88.

*Sweet vs. Hulbert*, 51 Barbour, was not a suit pending in an inferior court and there was no special provision for an appeal.

The *South Carolina Railroad Company vs. Ells*, 40 Ga., p. 37, came before the Supreme Court of Georgia on a regular appeal from a decision of a Judge of a superior court, and is not in point as a precedent for this proceeding.

In the *People vs. Works*, 7 Wendell, 437, the motion was not resisted. The case does not seem to be a well considered one, as the court there granted a writ of prohibition to a Tax Collector to stay proceedings under a warrant in his hands.

Judge Bronson, in *The People vs. The Supervisors of Queens County*, 1 Hill, 195, in a similar case, held that the writ would not lie, and besides clearly, in *The People vs. Works*, there was no remedy by appeal.

The case of *Quimbo Appo*, cited from 20 New York, 531, seems to be more in point, but it will be observed that it was a criminal case and the writ was invoked by the State. Did the State have a right to appeal? If it did not, there was no other remedy.

As to what was decided by this court in the former case between the same parties:

It seems to us too plain for argument that the whole law was not declared unconstitutional.

---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

---

The court expressly declares that it only considered one part of it. "As to any other part we say nothing." It considered and condemned that part of the law which as to compensation required nothing more than that "the report of the commissioners shall be recorded by the Clerk of the Court in whose office the same is filed in the judgment book of said court." And the court concluded that a taking of private property upon such simple finding of the amount of compensation due is clearly a "taking of private property without just compensation."

And the conclusion would be the same if it could regard the finding as a judgment, for a judgment in its opinion is not compensation, and to support this latter doctrine quote the distinguished authorities of Chancellor Kent and Chief-Justice Sharkey.

And it is that portion of the law which authorizes the taking of the property on the finding of the commissioners or judgment of the court, which the court is considering when it says: "We have no doubt at all that that portion of the statute which authorizes the taking of private property, and which we have been considering, is unconstitutional and void. As to any other part of it we say nothing."

What does Chancellor Walworth say in the case of *Bloodgood vs. The Mohawk and Hudson River Railroad*, cited from 18 Wend., alluded to in the opinion, "the compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided and upon an adequate fund," &c.

What action of the Circuit Court was condemned? Its proceedings under that part of the law which did not secure adequate compensation, "for neither a bond nor a judgment of this kind answers the requirement of the constitution in this particular."



---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

---

we contend that the proceeding authorized by the 20th section is not liable to the objections sustained by this court in other portions of the law, and that the principles of reasoning which make them unconstitutional and void do not apply to this section. It comes up to the requirement of Judge Dixon in *Bohlman vs. The Green Bay and Lake Pepin Railway Company*. 30 Wis., 107.

It is said "an adequate and safe fund has been provided which he (the land owner) may at some future time be compensated."

In the case at bar the money has been actually brought into court.

We regard the reasoning of Judge Baker, in his opinion as Exhibit E to the answer of the railroad company, No. 18, as well considered and conclusive, and ask for a full consideration of it by this court.

Section one of chap. 175 of the Laws of Wisconsin, passed April 6th, 1861, we contend is not similar to the 20th section of our act. The adequate and safe fund is not provided. And the decision in *Bohlman vs. The Green Bay and Lake Pepin Railway Company*, construing the law is not authority for this court, for in Wisconsin compensation must first be made. 22 Wis., 581; 30 Wis.,

decisions in States which have constitutions requiring compensation would not be much guide in regard to the general rule." 1 Redfield on the Law of Railways, (5th Ed.) No. 3, note.

The provision in the constitution of Indiana of 1816, was: "No man's property shall be taken without a just compensation being made therefor."

The provision of our constitution is: "Nor shall private property be taken without just compensation."

The two are almost identical and the same in meaning.

---

State ex rel. v. J. T. & K. W. R. R. Co.—Argument of Counsel.

---

The present constitution of Indiana requires pre-payment.

The Supreme Court of that State has recently (September 17th, 1883) decided that under the old constitution, that of 1816, a railroad company was justified in appropriating land for its right of way without first making compensation therefor. *Prather vs. The Western Union Telegraph Company*. Advance case reported in 14 Am. and Eng. R. R. Cases, p. 1.

“Compensation is a primary requisite, but the time when it is to be made depends upon constitutional provisions or on the requirements of the statute bestowing the power —” 14 Am. and Eng. R. R. Cases, p. 18; note at end of *Prather vs. The West. Union Telegraph Co.*

The constitutions of all the States prohibit the taking of private property by virtue of the power of eminent domain without making due compensation. Unless, however, the constitutional provision be express, the compensation need not be pre-paid when the land owner has a sufficient existing remedy. See 14 Am. and Eng. R. R. Cases, p. 19, citing *Johnson vs. Joliet &c., C. R. R.*, 23 Ill., 202; *Townsend vs. Chicago and A. R. R.*, 91 Ill., 545; *Haverhill Bridge Proprietors vs. County Commissioners*, 103 Mass., 120; *Simms vs. Memphis C. & L. R. R. Co.*, 12 Heisk., 621; *Bonaparte vs. C. & A. R. R.*, Bald., 205; *Bloodgood vs. Mohawk and H. R. R.*, 14 Wend., 51, s. c., 18 Wend., 9; *Fox vs. West. Pac. R. R.*, 31 Cal., 538; *Raleigh and G. R. R. vs. Davis*, 2 Dev. and B. 451; *Commissioners vs. Pitts. & C. R. R.*, 58 Pa. St., 26; *Danville, H. & W. R. R. vs. Commissioner*, 73 Pa. St., 29; *Lehigh Valley R. R. vs. McFarlen*, 4 Stew. N. J., 706; *Hatch vs. Vermont Cent. R. R.*, 25 Vt., 49; *New Alb. and S. R. Co. vs. Connelly*, 7 Md., 32; *Jeffersonville M. & I. R.*

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

vs. Dougherty, 40 Ind., 33; Prather vs. Jeffersonville & I. R. R., 52 Ind., 18.

a conclusion, we desire specially to ask the court's attention to the fact that the plaintiffs before applying for extraordinary writ had filed their bill in equity and obtained an order enjoining the proceedings which it is sought to prohibit.

This equity suit is inseparably connected with the proceedings now before the court, and must be considered with the extent, if no more, of showing that the plaintiffs have an ample remedy, and have themselves sought such a remedy in chancery.

It may be said that the plaintiffs filed their bill to enjoin the condemnation under the first petition. Note, however, no objection was made to the filing by the defendants of their supplemental answer, setting up the proceedings now sought to be prohibited.

That no exceptions were taken to the answer; that the plaintiffs consented to argue the defendant's motion, on the ground of this supplemental answer, to vacate the injunction which had been revived under the order of this court. That this motion was argued by plaintiffs' counsel; that the court having vacated the restraining order, an appeal was taken to this court, and if not taken, it has been through the omission or neglect of plaintiffs' counsel so to do. In all, the plaintiffs have sought and have ample relief in a bill of equity for the very matter which they now seek to have enquired into, under their summary and extraordinary proceedings originally in this court.

We trust the court will not sanction the practice.

R. JUSTICE WESTCOTT delivered the opinion of the court.

This is a proceeding by writ of prohibition to the Judge

---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

---

of the Circuit Court for the Fourth Judicial Circuit of Florida.

The pleadings are as follows:

*To the Honorable, the Justices of the Supreme Court of Florida:*

The petition of Mary L. Moody and of Paran Moody, her husband, respectfully shows and suggests to your Honors:

That on the 31st day of May, 1883, your petitioners filed their bill in equity in the Circuit Court in and for Duval county, Florida, before the Hon. James M. Baker, the Judge of said Court, against the Jacksonville, Tampa and Key West Railroad Company, alleging that they had forcibly entered upon certain lands of your petitioners and without their leave or the authority of law, and against your petitioners' consent and wishes, were appropriating said lands or a portion of them to the building of a railroad and prayed an injunction against said defendant to restrain them from said acts of trespass. Upon said bill the said court granted the injunction prayed for. Afterwards the defendant filed an answer justifying their alleged trespass under and by virtue of an act of the Legislature of Florida, entitled "an act to provide a general law for the incorporation of railroads and canals," being chapter 1987, (No. 12) of the acts passed in the year 1874, and which was approved February 19th, 1874, whereupon, the said court, after argument heard, dissolved the said injunction, and your petitioners appealed from the said order of dissolution to this court, which, at its last January term, pronounced its opinion in said cause and rendered its judgment and decree whereby it said that that portion of the said statute which authorizes the taking of private property for public use, and under which the said defendants

---

---

ate ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

---

, is unconstitutional and void, and this court re-  
he order of said Circuit Court, dissolving the in-  
, and decreed that the said injunction be revived,  
nue until the further order of the court, or until  
oration may be granted the right of compulsory  
e of the land of the plaintiffs, by the proper au-  
and just compensation is made to him therefor  
s legal condemnation to the use of the company.  
the mandate of the court in said cause was filed in  
Circuit Court on the 5th day of June, 1874.  
petitioners now suggest to your Honors, that not-  
ding the judgment and decree of this court, and its  
in said cause, involving the right of said railroad  
y to exercise by delegation the right of eminent  
and which claim this court decided against said  
ion's right, the said Circuit Court, the Hon. James  
er presiding, is about to give force and effect to so  
f said act as provides for the right of compulsory  
e of plaintiff's land by said corporation; that said  
tion has filed in the said Circuit Court its petition  
for the appointment by said Circuit Court of com-  
ers under said statute for the appraisal of your pe-  
s' land in order that they may be condemned, and  
l Circuit Court has announced its intention to ap-  
hem. A transcript of all the proceedings in the  
ly certified, accompanies this suggestion, by which  
Honors will be informed of the truth of the facts  
ated.

petitioners therefore pray that a writ of prohibi-  
ay be issued, prohibiting the said Circuit Court and  
dge thereof from appointing any commissioners un-  
d act, for the purpose of appraising or condemning  
etitioner's land for the use of said corporation, and  
oing any other act under said statute to uphold or en-

---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

---

force any alleged claim by said corporation that it has the right of compulsory purchase of your petitioner's land, and from in anywise violating the mandate of this court which has been issued in said cause. And that your Honors may make such other order in the premises as may be proper.

MARY L. MOODY AND PARAN MOODY,

By E. M. L'Engle, their Attorney-at-Law.

The petition of the company which accompanies the suggestion, after stating its incorporation, and its contemplated line of road, and the construction of its road from Jacksonville to Palatka, recites that it has constructed its track upon and over certain lands being the separate property of Mrs. Mary L. Moody, wife of Paran Moody, giving description of the lands, the line of the track in detail, and asserting possession. The petition recites further that it has attempted to acquire title to the land by appraisal to as much of said lands as is the track and road-bed, including a right of way one hundred feet along the line of location of its track, but that the title thereby attempted to be acquired is defective, and that it has not acquired title thereto; that the portion of said lands which the company seeks to acquire is a strip fifty feet wide on each side of the centre of its main track; that the company has in good faith constructed and finished a railway over the said lands, have made a survey and map thereof by which such route or line is designated, and has located its road according to such survey, and filed certificates of such location, signed by the engineer of the company, in the office of the Clerk of the Court for Duval, being the county in which such real estate is situated; that the land described in the petition is required for the purpose of constructing and operating the said railroad, and that the company has not acquired title thereto.

---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

---

Petitioner then prays for the appointment of three qualified commissioners to appraise the compensation to be paid Mrs. Moody for so much of the real estate proposed to be taken by said company for its track and right of way as aforesaid; that the court may fix the time for the first meeting of the commissioners; that the court may authorize the road to continue in possession and use of such real estate, and that all actions or proceedings against said company on account thereof, or by reason of the use, occupation or possession of such real estate, pending the proceedings, on the company paying into court a sufficient sum, or giving security, as the court may direct, to pay the compensation therefor when finally ascertained, either of which your petitioner is ready and hereby offers to do, whenever and as the court might direct. Petitioner prays the court to at once direct and determine what sum shall be paid into court, or security given by your petitioner, and thereupon that an order be made enjoining and restraining the said Mary L. Moody and Paran Moody, her husband, from further prosecuting or bringing any and all actions or proceedings against your petitioner by reason and on account of the use, occupation and possession of the premises aforesaid pending and until the final determination of these proceedings. There was a prayer for alternative relief, and the petition was sworn to by an officer of the company.

It is made to appear that the court has required a cash payment of \$5,000 to be paid into court to pay the compensation for the lands when ascertained. Upon the filing of this petition and exhibit in this court, a rule to show cause was awarded in language, as follows:

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

IN THE SUPREME COURT OF FLORIDA,  
June Term, A. D. 1884.

THE STATE OF FLORIDA:

*To the Hon. James M. Baker, the Judge of the Circuit Court of the Fourth Judicial Circuit of Florida, and the Jacksonville, Tampa and Key West Railroad Company:*

Mary L. Moody and Paran Moody having filed in this court their suggestion, that notwithstanding the opinion of this court heretofore, at its last January term pronounced, and its mandate on the 21st day of last May, issued in the cause wherein Mary L. Moody and Paran Moody were the appellants and the Jacksonville, Tampa and Key West Railroad Company and others were the appellees, you, the said James M. Baker, Judge, as aforesaid, are about to give force and effect to so much of the act of the Legislature of the State of Florida, approved February 19th, 1874, (being chapter 1987, No. 12, of the said acts,) as provides for the right of compulsory purchase of lands by railroad corporations, and that you are about to appoint commissioners under said statute for the appraisal of said petitioners' lands, in order that they may be condemned for the use of said railroad company. And the said petitioners, praying that the State's writ of prohibition may be granted in this behalf to prohibit you, the said James M. Baker, Judge, as aforesaid, from appointing any commissioners under said act for the purpose of appraising or condemning the lands of said petitioners for the use of said corporation, and from doing any other act under said statute to uphold or enforce any alleged claim by said corporation, that it has a right of compulsory purchase of the petitioners' land, and from in any wise violating the mandate of this court, which has been issued as already stated. You, the said James M. Baker, Judge, as aforesaid, and you, the said Jacksonville, Tampa and Key West Railroad Company, are therefore



---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

---

commanded that you show cause, on Thursday, the 10th day of July next, at ten o'clock, A. M., why the writ of prohibition should not issue as prayed for.

Witness, the Honorable Edwin M. Randall, Chief-Justice of the Supreme Court of the State of Florida, and the seal of said court, at Tallahassee, this 25th June, A. D. 1884.

[SEAL.]

C. H. FOSTER,

Clerk Supreme Court of Florida.

The defendants demur to the suggestion in prohibition, and there was joinder in demurrer.

Several grounds of demurrer are here set up, but we think it necessary to examine but one. It is insisted by the defendants that the Circuit Court, under the statute, has full jurisdiction to have the appraisement made at the suit of the company, and that for this reason no prohibition will lie.

The contrary is maintained by the plaintiffs. They insist that the Circuit Court is exercising powers under a statute which is unconstitutional, that it is exceeding or attempting to exceed its powers. If the Circuit Court in lending its aid to have the appraisement and compensation sought under the allegations of the petition of the company is enforcing the company's constitutional rights, then a prohibition certainly will not lie.

The right here sought to be enforced is the exercise of the right of eminent domain, in a case where a railroad without having acquired title to land *have constructed upon it their track*. The proceeding under this state of facts is regulated by the twentieth section of its charter, (§20 chap. 1987, Laws of Fla.,) which provides as follows:

“In any case where a railroad or canal company shall not have acquired title to any land upon which they have constructed their track or canal, or if at any time after an attempt to acquire title by appraisal of damage or other-

---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

---

wise, it shall be found the titles thereby attempted to be acquired is defective, the company may proceed anew to acquire or perfect such titles in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court shall authorize the corporation, if in possession, to continue in possession, and if not in possession to take possession and use such real estate during the pending of such new proceedings, and may stay all actions or proceedings against such company on account thereof, on such company paying into court a sufficient sum, or giving security, as the court may direct, to pay the compensation therefor when finally ascertained. No injunction shall be granted until said compensation has been fixed and determined." And the compensation to be awarded under the statute embraces the value of such tract of land proposed to be taken, with the improvement thereon, and each separate estate therein, and the damage sustained by the owner by reason of the taking thereof. It is to be noted that this compensation under the statute embraces not only the value of the land but also "the damage sustained by the owner," resulting from the use and possession during the pendency of the proceedings. Under some decisions this is deemed essential to the constitutionality of the act. *Davis vs. San Lorenzo R. R. Co.*, 47 Cal., 51'

This section of the act provides a means by which a company already in possession of land of a party by having constructed its track upon it, without acquiring a title to it from the owner, that is by an unlawful entry or trespass may acquire title. The owner under this section of the act cannot have an injunction against the use and possession of the land until the compensation has been fixed and determined. After that compensation is fixed, the law contemplates that in the event of non-payment he may at once enjoin the continuation of the unlawful antecedent possession.

---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

---

sion. During the pendency of these proceedings the temporary possession is protected in the company, and the final dominion and right of possession of the owner is not destroyed until there is an actual payment of the money which is to be realized from cash or security required to be antecedently deposited by the court. There can be no right to a continuation of the possession or right of property, whether it be a fee simple or an easement in the company, except upon payment of the compensation fixed by the commissioners.

So far as the matter of just compensation which the owner of the land is to receive upon the taking of his property is concerned, its payment to him is, we think, secured here within the meaning of the constitution. In the case of *Moody & Wife vs. The Jacksonville, Tampa and Key West Railroad Company*, decided at the last term, we held that a judgment against a corporation, with the right to have execution thereof, was not a just compensation to the land owner for the taking of his land for construction of the road and its appropriation to its use. We held also that in the absence of legislation securing just compensation a court of equity could not authorize the condemnation by securing it to the company; that this was a legislative function, and that a court of equity was powerless to sanction such a trespass for the reason that the right of the owner to just compensation must be the result of legislative action. We did not say, either there or elsewhere, nor can or do we say now, that where there had been an unlawful entry and appropriation the *Legislature* could not authorize a condemnation and change of ownership, by protecting and enforcing the constitutional right of just compensation to the owner before his dominion and right of property was taken away. That is this case. So far as the matter of the sections of this law, which regulate the proceedings

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

for appraisal by commissioners, are concerned there may be constitutional objections to portions of them, but there is in these sections sufficient to authorize and prescribe a constitutional method of proceeding, complete in itself: that these unconstitutional portions of the sections may be stricken out, or simply disregarded, in the proceeding, and the constitutional provisions followed, under such circumstances, cannot be questioned. Such is the doctrine announced in this court on several occasions, and it is fully sanctioned by the cases. Therefore, if the authority of the court to require security for the compensation, as authorized in this proceeding, is unconstitutional, there still remains the duty to make a cash deposit sufficient to meet the compensation to be ascertained, and the party has the right to enjoin the use of the land until he is paid after damage is ascertained.

Our attention has been called to the principles announced in the case of *Moody & Wife vs. The Jacksonville, Tampa and Key West Railroad Co.*, decided at last term. This was a suit in equity. The present case is one in prohibition, under entirely different circumstances. It seeks to prohibit the court from exercising a jurisdiction which it plainly possesses under a constitutional statute. That decision was to the effect that section seventeen of the charter of this company was void, being beyond the power of the Legislature, and that such portion of the act regulating the proceeding to appraise by commissioners, as authorized the company to enter upon, take possession of and proceed with the construction of its road, even before filing a petition for the appointment of commissioners, was void. We there said as to section twenty of the act, the one now under consideration, that "other provisions of the act regulating proceedings to acquire titles under circumstances not existing in this case, and which do not apply to it, are called

---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

---

to our attention, but as they do not control this proceeding, or upon their face or according to their plain letter and intent, purport in any manner to affect the present case, it is only necessary to mention their character. These sections prescribe a method of proceeding where the company shall not have acquired title to land upon which "they have constructed their track, or if, after attempt to acquire title, the title' attempted to be acquired is defective, or the title is in the trustee of an infant or idiot without power of sale." We plainly say that proceedings under these sections are unlike those under the sections under which the company was then proceeding. The Judge of the Circuit Court, in his opinion upon this subject, which we have read with interest, correctly construes the opinion rendered in the former case in the matter of its limitations. In addition to the above general limitations, we are continually asserting in that opinion that we do not go beyond the exact case before us. Indeed, had we attempted to define the rights of either of the parties in a case where the company had "constructed their track," what we might have said would have been simply *obiter* to which even the doctrine of *stare decisis* would have been inapplicable. It would not have been entitled to the standing of a precedent even. Certainly the rights of parties could not be thus determined.

What is the rule of the cases upon this subject? In the first place what is this case? It is the illegal laying of a track by a railroad company, preceded by an unlawful and unauthorized entry—a trespass.

In the case of *Secombe vs. The Railroad Company*, 23 Wall., 118, the Supreme Court of the United States, in stating its views of the power of the Legislature, in the matter of the mode of exercising the right of eminent domain, says: "There is no limitation upon the power of the

---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

---

Legislature in this respect if the purpose be a public one and just compensation be paid or tendered to the owner for the property taken. It hardly need be said that the taking of private property in order that a railroad may be constructed is a public necessity. It is urged that the property in controversy was occupied before the proceedings in condemnation were begun, but there is nothing in the finding of fact to show that this was so. Even if the plaintiff were in a situation to make the objection it would not avail him, for prior occupation without authority of law would not preclude the company from taking subsequent measures authorized by law to condemn the land for their use. If the company occupied the land before condemnation without the consent of the owner, and without any law authorizing it, they are liable in trespass to the persons who owned the land at the time, but not to the present plaintiff."

In the case of Justice vs. Nesquehoning Valley Railroad Co., 87 Penn. State, 32, Chief-Justice Agnew delivering the opinion of the court, says: "This is not the case of mere trespass by one having no authority to enter, but of one representing the State herself, clothed with the power of eminent domain, having a right to enter and to place these materials on the land taken for a public use, materials essential to the very purpose which the State has declared in the grant of the charter. It is true the entry was a trespass by reason of the omission to do an act required for the security of the citizen, to wit: to make compensation or give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to taking the chattels of the railroad company. \* \* \* In the case of a common trespasser, the owner of the land may take and keep his structures *volens volens*, but not so in this case, for though the original entry was a trespass, it is well settle

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

*that the company can proceed in due course of law to appropriate the land and consequently to reclaim and avail itself of the structures laid thereon.*" The court, speaking of the original illegal entry, says: For it "the owner has his appropriate remedies; his action of ejectment to recover and retain his land and its use until the company shall proceed according to law and his action of trespass to recover damages for the injury sustained by the unlawful entry and holding possession, and whatever loss has been incurred by his illegal acts." And in *Harvey vs. Thomas*, 10 Watts, 63, it was held that the subsequent proceeding to assess compensation was a protection against a recovery of vindictive damages.

The Supreme Court of Alabama, speaking through Brickell, Chief-Justice, in the case of *Jones vs. N. O. & S. R. R. Co. and Im. Asso.*, 70 Ala., 232, says: "The duty rested upon the appellee," that is the company, "before the taking and appropriation of the lands to have caused in the appointed mode an ascertainment of the compensation to which the owner was entitled and to have made payment of the compensation. Neglecting this duty the entry upon and possession of the lands was wrongful. No title to them was acquired and the title of the owner was not divested. The neglect of the duty, the wrongful entry and possession, does not preclude the appellees," that is the company, "from resorting subsequently to the appropriate proceedings for the acquisition of the lands and, of consequence, availing itself of all the structures it may have placed thereon."

This court sustains clearly the proposition that the company, notwithstanding the original unlawful entry, does not stand in the relation of a common trespasser, and has the right to subsequent legal condemnation.

It is certainly unnecessary to repeat page after page of

---

 State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.
 

---

precedent upon this subject. They sustain the conclusion that while the original entry may have been tortious, yet if the Legislature has, with the power to peremptorily purchase, imposed the corresponding duty of making just compensation, the subsequent condemnation is legal.

With a few comments on the cases upon this subject cited by the plaintiffs, we leave this branch of the case. In the State of Wisconsin, our attention has been called to the following cases: Bohlman vs. G. B. & L. P. Railway Co., 30 Wis., 105; Burns vs. W. & M. R. R. Company, 9 Wis., 450; McAulay vs. W. V. R. R. Co., 33 Vermont, 311; and to chapter 175, General Laws of that State, April 6th, 1861. The first case was an action for an injunction to restrain a company from appropriating plaintiffs' land in the construction of a railway track where the company had not taken any measures looking to compensation of plaintiffs. It was not a case where the track had been constructed, nor was it based upon a statute like the statute of Florida. It was based upon a clause of an act (sec. 2) which gave a right to the owner of the land over which the company had constructed its road without making compensation, and the decision was that in a case where he had not consented to the unlawful entry he was entitled to an injunction restraining any entry by mules and teams for the purpose of preparing the road bed, as well as to damages. It is true that Mr. Chief-Justice Ryan, in speaking of the entire act, says that it was intended only to apply to cases where the railroad company has entered upon and has actually built and put its road in operation over the land by the permission, tacit or express, of the owner. The effect of the decision was to say that where there was an assent to the entry the owner's right to an injunction until his compensation was ascertained did not exist under the statute, but that where there was a for-



---

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

cible entry his right to such injunction did exist outside of the statute; and the court holds that if the statute denied this right to an injunction after a forcible entry to prevent the use or occupancy of the land by the railroad until the amount of damage to which any owner might be entitled should have been liquidated, it would have been unconstitutional. I do not understand the statute of Florida to deny to the owner of the land his right to enjoy such use following a forcible entry until he has been compensated, or his compensation by cash deposit secured. If the company here had entered into possession of this land forcibly, and propose to retain it without compensation, the owner is nowhere denied the right to an injunction "to prevent the use of the land" for such purpose until his damages shall be paid him or secured to him in cash when ascertained. What the owner here apparently wishes is to prevent any legal ascertainment of the damages under the statute entirely, to dispossess the road permanently by preventing the company's compliance with the law, which authorizes it when it shall have constructed its track to ascertain the compensation due, and which requires it to make just compensation before it can have permanent use of the land for the public purpose for which it was created. Here this court is asked to prevent the company from exercising its right of compulsory purchase through the Circuit Court after it has instituted its proceeding looking to appraisal and after it has deposited its money in the court under the provisions of a law, constitutional to that extent at any rate.

The case of *Andrews vs. The Farmer's Loan and Trust Company*, 22 Wis., 288, decided that the act considered in 30 Wis., 195, in so far as it restrains the right to injunction above stated, is constitutional.

The case of *Burns vs. W. & M. Railroad Co.*, 9 Wis., 450, has no application to the matter of the construction of

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

this statute. The question was whether certain lands taken were necessary for the purposes of its charter. What these decisions mean is explained in subsequent cases in Wisconsin construing these statutes. See especially the case of *Sherman vs. The Milwaukee, Lake Shore and Western Railroad Company*, 41 Wis., 651. See this case also for a discussion of the extent of the liability of a railway company trespasser, having the right of eminent domain, in ejectment or trespass. We cannot see what aid the cases cited from 33 Vermont, 311; 3 Stockton, 106, and 7 N. H., 70, can give us in the construction of our statute.

After writing the preceding portion of this opinion, we have received an additional brief of the plaintiffs and we will examine the points made to the extent that reach the question of jurisdiction.

A construction of that portion of the act providing for a stay of actions pending against the company and denying a right of injunction until compensation has been fixed, is deemed necessary. The only remedy which the owner had in equity as to the wrongful possession is an injunction affecting the possession. This the statute suspends until the compensation to which he is entitled is ascertained and then it is revived. The other class of actions stayed are actions at law concerning the possession. I do not understand that any action at law, growing out of the wrongful entry, sounding in damages is stayed by this action, or that any other legal remedy which he may have is stayed unless it affects the present temporary possession without title. That, the Legislature secures to the company in order that it may discharge its duties to the public, and at the same time it secures just compensation to the owner. This question of power is discussed in the case of *Andrews vs. The Farmer's Loan and Trust Company*, 22

---

State ex rel. v. J. T. & K. W. R. R. Co.—Opinion of Court.

---

Wis., 295, where the suspension of the equitable right to an injunction is sustained as constitutional, and if this be so a stay of legal remedies affecting the possession is constitutional also. This stay of proceedings relates to actions accruing and instituted after the passage of the act, and it is within the power of the Legislature to prescribe reasonable rules for the stay of actions in cases of this character. Objection is made on the ground that the court is given the authority to fix the cash sum to be paid into court to meet the compensation to be awarded, and because the right to institute the proceedings to appraise is restricted to the company. These objections concern the method of exercising the right of eminent domain under the constitution, as to which, as remarked by the Supreme Court of the United States: "It is no longer an open question in this country that the mode of exercising the right of eminent domain in the absence of any provision in the organic law prescribing a contrary course is within the discretion of the Legislature."

The court here has authority to hear witnesses, to determine the amount of the deposit by virtue of its general power, to determine what is a sufficient sum and it is a very proper authority to exercise the power. The constitution nowhere provides that the owner shall have the right to institute a special proceeding to ascertain his damage. He is left to his ordinary legal and equitable remedies as they exist. The limitations of the constitution concern the legislative power to take private property and the only limitation is that it shall be taken for a public use and with just compensation to the owner. Any method which secures that to him is constitutional. It is not necessary that his rights of action should be increased.

We think we have considered all the questions which arise in determining whether the Circuit Court is not ex-

---

Snow and Long vs. Lake's Administrator.—Opinion of Court.

---

exercising a power within its constitutional jurisdiction. Our conclusion is that it is acting within its powers, and the necessary result is that a writ of prohibition must be denied.

The judgment is that the rule is discharged, and the writ denied, the costs to be paid by the relator, ~~Parson~~ **Parson** ~~an~~ **an** Moody.

---

HENRY M. SNOW AND JOHN G. LONG, APPELLANTS, ~~vs.~~ **vs.**  
LAKE'S ADMINISTRATOR, APPELLEE.

1. A grantee in a quit claim deed, or deed of release, occupies the same position in respect to an unrecorded prior deed or mortgage as did his grantor. He is not a *bona fide* purchaser without notice within the meaning of the recording acts.
2. A mortgage though unrecorded is good as between the parties thereto; and an assignee or release by quit claim of the mortgagor's interest is not allowed to invoke the aid of the registry laws to avoid a prior mortgage.

Appeal from the Circuit Court for St. Johns county.

The intestate, Chas. O. Lake, died after the commencement of the suit, and Walter Lyon was appointed administrator of his estate, and made party complainant.

The other facts of the case are stated in the opinion.

*C. M. Cooper* for Appellants.

*Fleming & Daniel* and *J. C. Marcy* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

Charles O. Lake commenced a suit to foreclose a mortgage executed to him by Snow in 1874, upon a lot in St. Augustine, to secure the payment of \$1,500, as evidenced by

---

---

Snow and Long v. Lake's Administrator.—Opinion of Court.

---

---

several promissory notes executed by Snow to Lake. The mortgage was executed in due form by signing, sealing, witnessing, acknowledgement and delivery, and left for record in the clerk's office, and duly recorded, according to the clerk's certificate on the original mortgage.

In February, 1881, as appears by the answer of Long and by the testimony, Snow and wife conveyed the mortgaged property to Long by deed of "release and quit claim" of "all the estate, right, title, interest, separate estate, dower and right of dower, property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part" in the premises and appurtenances. Long, in his answer and testimony, and by a certified copy of the record of the mortgage, shows that the record of the mortgage has no seal annexed to the signature of Snow, wherefore he insists that the record does not show any valid mortgage, and that his purchase and the deed of Snow to him gave him a title to the property unincumbered by the mortgage, and that the record gave him no notice thereof, and he had no notice of the mortgage lien.

Snow was in possession of the lot at the time of the quit claim to Long. The bill did not allege, but the testimony showed that the mortgage was given to secure the purchase money on the purchase by Snow from Lake, mortgagee.

The Chancellor, at the hearing, decreed in favor of the complainant, that the record of the mortgage was sufficient notice, notwithstanding the want of a seal thereon, to put the purchaser, Long, upon his guard; that the mortgage held by complainant is a good and valid lien upon the property as against the defendants. After reference to a master to ascertain the amount due, a decree was entered for a sale of the lot, in the usual form, and foreclosing the equity of redemption.

---

 Snow and Long v. Lake's Administrator.—Opinion of Court.
 

---

From this decree defendants appeal and pray a reversal.

The only questions considered by counsel in the argument of the cause relate to the effect of the imperfect record of the mortgage, and appellants insist that Long is not chargeable with notice of the mortgage, because under the statute a deed or mortgage without seal is void as against a subsequent purchaser in good faith and for value. While there is some apparent conflict of authorities as to the effect of such a record, the preponderance seems to be that under a statute like ours such a record imparts no notice to a *bona fide* purchaser; that on the fact of the record there is no valid mortgage.

But we do not propose to discuss this question. Though the answer of Long asserts that he purchased the property for a valuable consideration from Snow and took a deed of conveyance which vested in him a title in fee simple, yet the deed he exhibits is merely a release and quit claim from Snow of his interest. The value of the property is variously stated, at six or eight hundred to two thousand dollars at the date of the mortgage, and at seven to nine hundred dollars in 1883 when the cause was tried, in the judgment of witnesses.

As to the effect of a deed of quit claim and release, Mr. Justice Story delivering the opinion of the court in *Oliver vs. Platt*, 3 How., 333, 410, says: "Another significant circumstance is, that this very agreement contained a stipulation that Oliver should give a quit claim deed only for the tracts; and the subsequent deeds given by Oliver to him accordingly were drawn up without any covenants of warranty, except against persons claiming under Oliver or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title and interest in the property; and under such circumstances it is difficult to conceive how he can claim protection as a *bona fide* pur-

---

Snow and Long v. Lake's Administrator.—Opinion of Court.

---

chaser, for a valuable consideration, without notice, as against any title paramount to that of Oliver.”

In Kerr vs. Freeman, 33 Miss., 292, it is said: “A quit claim deed, or in other words a deed of release, under general principles of law can never operate as a conveyance in a technical sense, unless the party taking such deed is in possession of the land, and then the deed merely operates to enlarge the estate, whatever it may be.” This is the rule of the common law. By our statute a deed of “lease and release operates to transfer the possession of the releasor to the releasee as perfectly as if the releasee had been enfeoffed by livery of seisin, if livery of seisin can be made at the time of the execution of the deed. McC. Dig., 215; Act Nov. 15, 1828.

The Supreme Court of Alabama, in Smith's Heirs vs. Branch Bank of Mobile, 21 Ala., 125, had this question before it. The court say: “It is too clear to admit of a doubt that an unrecorded mortgage, as between the parties themselves, is valid and binding. It is also valid as to all subsequent creditors or purchasers with notice of its existence. \* \* That instrument under which the bank claims is a quit claim deed, or, what is more appropriately designated by the common term, a release. \* \* The grantor in this case only purports to release and quit-claim the title and interest which he had. The question then arises, what interest did he have? The plain answer is, the mere equity of redemption, nothing more, and this only passed by the quit claim deed. Thus the bank stands in the place of the mortgagors, holding only what they could sell, the equity of redemption. \* \* \* To enlarge the interest by construction would be to make a different contract from that which the parties have entered into; would be, by judicial interpretation, contrary to the face of the deed and the facts on which it is founded, to pass the entire estate, by invest-

---

Snow and Long v. Lake's Administrator.—Opinion of Court.

---

ing it with the consequences of a fraudulent sale of the whole, when the grantor had but the equity of redemption, and this, too, for the purpose of defeating the just lien of Smith for the purchase money. We feel quite confident no case can be found which carries the doctrine thus far. \* \* \* The bank, holding a mere quit claim deed, cannot be regarded as a *bona fide* purchaser for a valuable consideration without notice. And we see no reason why such purchaser should be allowed to invoke the aid of the registry statute to avoid a prior mortgage which has not been recorded, any more than the aid of the chancery court for his protection. We express no opinions as to what we should decide, had the deed to the bank, even though it contained no warranty, purported to convey the entire title to the premises instead merely of that which the grantor had."

There seems to be no conflict of authority as to the effect of a mere quit claim or release by deed; it is simply a release or assignment to the release of such interest as remains in the releasor and puts the grantee in the precise place of the grantor as to that interest as it existed at the date of the release. Such a deed is not even an estoppel upon the releasor as to any after acquired interest. *Rawle* Cov. Tit., (4th Ed.) 389.

The conclusion must be that the appellant, Long, by virtue of the quit claim deed, is not in the position of a *bona fide* purchaser without notice of the equities of the mortgagee, that he stands in the shoes of his grantor and is no more entitled to plead the registry act as against the mortgage than is the mortgagor himself.

For these reasons the decree of foreclosure is affirmed.



---

Ballard et al. v. Eckman & Vetsburg et al.—Statement of Case.

---

**L. M. BALLARD ET AL., APPELLANTS, VS. ECKMAN & VETSBURG ET AL., APPELLEES.**

1. **An oath to a bill for injunction by a solicitor, "that the facts set forth in the foregoing bill are true to the best of his knowledge, information and belief," is not sufficient to authorize an injunction. It states no facts, nor that affiant has any knowledge, information or belief whatever.**
2. **Where facts are stated on information the officer to whom application is made for an injunction should require the additional affidavit of the person from whom the information is derived, verifying the truth of the information.**
3. **An irregular or improvident order granting a preliminary injunction, however erroneous, will not affect a final decree granted after a full hearing upon the pleadings and testimony.**
4. **The question of fraud is one of motive and intent to be inferred from all the facts and circumstances attending a transaction, and does not depend upon presumptions not legitimately drawn from the fact.**
5. **When a purchase of goods is made in good faith and for a valuable consideration, from the owner who is embarrassed and insolvent, no fraud is imputed to the purchaser.**

**A**ppeal from the Circuit Court for Polk county.

**T**his is a creditor's bill filed by respondents against appellants. Respondents obtained judgments amounting to \$2,296.85, against Louis M. Ballard, in assumpsit; executions were issued and returned *nulla bona*. The bill alleges that L. M. Ballard has made a fraudulent sale and delivery of his stock of merchandise to H. D. Ballard, to defraud the creditors of Louis M., and to evade the payment of his just debts. A decree is prayed setting aside the sale and transfer, and declaring the stock of goods subject to the judgments and executions aforesaid, and for an injunction restraining defendants from interfering with or disposing of the goods.

---

---

**Ballard et al. v. Eckman & Vetsburg et al.—Statement of Case.**

---

---

The bill was sworn to by counsel for complainants, who says: "That the facts set forth in the foregoing bill are true, to the best of his knowledge, information and belief. On filing the bill, an order for injunction was granted, and it was ordered that the complainants enter into bond in the sum of two thousand dollars, conditioned to indemnify the defendants for the wrongful suing out of the injunction. It was further ordered that ————, of Polk county, be appointed receiver, to take charge of, sell and otherwise dispose of said stock of goods, and that the receiver hold the moneys arising from the sale subject to the order of the court. The record does not show that a receiver was named.

The sheriff made return as follows: "Service rendered by closing the store-house of L. M. & H. D. Ballard, the 17th July, 1882, and also taking an inventory of all the goods and appurtenances in said store-house."

The answer of L. M. Ballard admits the recovery of the judgments, the issuing of executions and the return of *nulla bona*. That prior to February 8, 1882, he was engaged in mercantile business with one A. J. English as partner, each owning one-half interest in the stock of goods. That in behalf of H. D. Ballard he bought the interest of English for about four hundred dollars, and on February 8, 1882, sold to H. D. Ballard the entire stock for seven hundred and fifty dollars, including some other property, the goods being valued at \$700, which \$750 has been paid by H. D. Ballard, by payment of the largest part to defendant's creditors, and in family supplies to himself for the residue. And he says that the sale of his said interest in the goods was made in good faith and without design to defraud his creditors or any of them. That he has no property out of which he can satisfy his debts. That even since the 8th February, 1882, H. D. Ballard has had pos-

---

---

Ballard et al. v. Eckman & Vetsburg et al.—Statement of Case.

---

---

session of the store and goods as his own property, and this defendant has no interest therein whatever. That whatever interest he had in the store of goods prior to the sale to H. D. Ballard, was by law exempt from levy and sale on said executions.

The answer of H. D. Ballard denies any fraud in the purchase by himself of the goods, but avers that it was made in good faith and for a valuable and full consideration. He says that he first bought, through his brother, L. M. Ballard, the interest of English in the stock of goods, and then purchased the interest of L. M. Ballard, and on the 8th day of February, 1882, took charge of the stock, and was in charge of what remained of it at the finding of the bill. He claimed and sold the stock as his own, having bought and paid for it. He had been engaged in merchandising at Bartow with one Bevill, and the firm had a stock on hand February 1, 1882, of \$1,138, and goods in transit, \$683.36, making a total of \$1,821.38. He purchased Bevill's interest in those goods and brought them to Medulla, and those, with the goods bought of English and L. M. Ballard, in the store, made a total of \$2,571.38, only \$350 of which had belonged to L. M. prior to his purchase of them. He has since purchased goods of merchants to the amount of \$1,240.84, making altogether the sum of \$3,812.18. He had paid for the goods bought of L. M. Ballard and English, of which \$376 was paid down in trade, a note was given for \$250 and the balance was traded out in the store by L. M., and previous to the filing of the bill he had paid him in goods out of the store the sum of \$244, thus overpaying the amount by \$120. That he had every reason to believe that the sale made by L. M. was made in good faith, for when he was bargaining for the stock L. M. told him he had sold some land that would clear up his liabilities, and respondent believed it was so, and still be-

---

Ballard et al. v. Eckman & Vetsburg et al.—Statement of Case.

---

lieves it would have been so but for the course of the complainants.

Complainants filed a general replication, and on November 9, 1882, on motion of defendants, the injunction was dissolved, and the goods ordered to be restored by the sheriff to the defendants, on the ground that complainants had not given a bond as required by the original order. On November 10, complainants' solicitors filed a bond and also a petition stating that they "having reason to fear, and do fear said stock of goods will be sold or otherwise disposed of before the final hearing and disposition of said cause," they pray an injunction forbidding the sale or other disposition of the stock of goods until the further order of the court. This petition was not sworn to. The injunction was granted. November 11th, defendants moved to dissolve the injunction on the ground that the petition was not sworn to. The motion was denied.

Testimony was taken before a referee, and on December 12, 1882, a final decree was made, "that the sale by Louis M. Ballard, of the stock of goods in question, was made without consideration and for the purpose of defrauding the creditors of the said Louis M. Ballard, and it further appearing to the satisfaction of the court that any interest in the said stock of goods which may have been owned by the said Hiram D. Ballard had been transferred by him to the said Louis, and that there is no doubt that the entire stock is subject to the judgment and executions of the complainants." It is therefore decreed that the sale by L. M. to H. D. Ballard be cancelled, and the stock of goods declared subject to the judgments and executions of complainants, and the temporary injunction made perpetual.

The following is an abstract of the material testimony contained in the record:

*Peter C. Hayes*, on the part of complainant, testified: He

---

Ballard et al. v. Eckman & Vetsburg et al.—Statement of Case.

---

had conversation with H. D. Ballard about the 10th May, 1883, in which H. D. Ballard stated to him, and showed him a paper stating the trade by which L. M. Ballard had sold H. D. Ballard a saw mill; that the latter had bought the mill from Louis M., and had paid him \$550 in goods, and gave three notes of \$250 each, to be paid in lumber. Louis M. Ballard occupied a store in which he carried on a general merchandise business from the early part of the year to June or July, when he was closed up by the sheriff. That paper bore date some time in March. By that paper Hiram D. Ballard agreed to give Louis M. Ballard \$1,300 for the mill, oxen, shop and wagon, of which \$550 was paid "in goods." Hiram told witness that he had no interest in the store that was afterwards closed up. This was about in June, three or four days before the store was closed up. Hiram D. Ballard told me that Louis M. Ballard was using his name in the store business on account of debts and judgments against Louis. Witness bought of Hiram D., an interest in the mill, and worked there; was in the store nearly every day. Louis M. was in the store managing the business. Hiram D. kept books and sold lumber at the mill, and to the best of my knowledge had nothing to do with the store. The paper showing the sale of the mill by Louis M. to H. D. Ballard was witnessed by James Keen and H. N. Allen. A writing is shown witness which recites a sale of the mill, &c., by L. M. to H. D. Ballard for \$1,300, of which "\$550 has been paid," but says nothing of the payment "in goods," and witness says this is not the same paper, because the paper shown him by H. D. at the time he bought an interest in the mill read "five hundred and fifty dollars in goods."

C. C. Gresham testified: As sheriff, took possession of the store and stock of goods, which were inventoried at \$2,125. H. D. Ballard had been engaged in keeping a bar-

---

---

Ballard et al. v. Eckman & Vetsburg et al.—Statement of Case.

---

---

room, and after closing that went in with Mr. Bevill general merchandise. When he came to Bartow he considered a poor man; understood from him that L. Ballard was a partner in the bar-room; the stock of liquor was generally of the value of \$500, in his judgment. Ballard came here with an ordinary supply of household kitchen furniture for a poor man; when witness went to levy the execution on the goods in the store, L. M. Ballard claimed the benefit of the exemption laws, and applied to have certain property exempted and set apart, and witness had property to the amount of \$330 set apart as exempted, and not included in the inventory. He asked me if he would not be allowed to exempt enough out of the stock to make one thousand dollars. Have no personal knowledge of H. D. Ballard's affairs.

A. J. English, in behalf of complainants, testified: That he was in business with L. M. Ballard, in the mercantile business, from September, 1881, to February, 1882; had a half interest; the entire business was valued at about \$2,500 when I commenced, and the assets were about \$1,900 when it ended. These amounts included the store building and accounts. When I first went in the business was run in the name of L. M. Ballard & Co. About October or November it was changed and run in my name. The first time he spoke to me about the change he said he thought he would go into bankruptcy, and that we would run the business in my name; afterward changed his mind about going into bankruptcy. My consideration began by my purchasing a half interest from L. M. Ballard, and ended by my selling out to L. M. Ballard. We took no inventory when the change was made, but stock was taken a few days before I went out. He said he was buying for H. I Ballard, and he was going out of business. Understood the trade for my interest was for H. D. Ballard, and took

---

---

Ballard et al. v. Eckman & Vetsburg et al.—Statement of Case.

---

---

mare from him in part payment. The bargain was made with L. M.; took a mare and colt from him in part payment.

*N. A. Booth*, for complainants, testified: In April, 1882, I sold to H. D. Ballard a yoke of steers. I asked him if he could give me an order to the store for a few goods. As well as I remember he said he had given orders there to the amount of \$70 or \$75, and he didn't care to give any more, that he would have to pay the money and take up his account in the store. I refer to the Ballard store that was closed up. L. M. Ballard was then selling goods in the store.

*James T. Evers*, for complanants, testified that during the summer of 1882 he went with L. M. Ballard to Savannah to buy goods. On the way he made a proposition to me that we go on and he would buy a stock of goods and come back, and he would turn the proceeds over to me. At Savannah witness endorsed L. M. Ballard's notes to Eckman & Vetsburg and Solomon Brothers to the amount of six hundred dollars for goods bought, which he paid. About the time L. M. sold his place I advised him to settle up what he owed for goods, that I thought he had enough to settle up what he owed, and he said if he paid out all he had on his debts it would leave his family without anything, and he would be ruined, or something to that effect. This was in December, 1881, or January, 1882, and before payment of the notes I had endorsed. Afterwards L. M. Ballard wrote me a letter (which has been misplaced) in which he proposed to sell out to me his goods, store-house and some lands near Medulla. He did not put any valuation on the property. This letter was written after Hiram D. moved to Medulla. He did not say anything in it about anybody having an interest in the goods. It was after he and English had settled up their partnership business. I

---

Ballard et al. v. Eckman & Vetsburg et al.—Statement of Case.

---

replied that I did not do business that way. After I heard that L. M. Ballard's store was closed up by the sheriff I wrote him that he knew he was owing these debts, and that the goods were his, and for him to pay for them if he could, and fix the matter up and go on with his business. He replied. I don't know where his letter is. I cannot remember all that letter, but at the end he said: "Stand still and see the salvation of the Lord." He did not reply to my assertion that he owned these goods. Did not deny owning the goods. On cross-examination witness says: When Mr. Ballard proposed to me to buy goods, sell them and turn over the proceeds to me, I understand it as a reality, but he has since told me he meant it as a jest. I took his word that he would protect me as indorser at Savannah.

*T. J. McMullin*, for complainants, testified that when H. D. Ballard first went to Medulla he was engaged in selling goods in the store-house used by L. M. Ballard. He was next engaged in the saw-mill business. He claimed to have an interest in the store when he first went there to the extent of the goods he carried there he bought from Beville & Co. I was wishing to go into business of that kind, and asked Hiram Ballard if he wished an assistant in the store, and he remarked that Louis Ballard was attending to that business, and he was altogether engaged in the mill. Before I got to see L. M. Ballard on the subject the young man, Gus. Hays, was employed in the store.

A writing was introduced, signed and sealed by L. M. Ballard, dated March 11, 1882, witnessed by H. N. Allen and James Keen, by which, in consideration of \$1,300, of which "\$550 has been paid, and the receipt hereof acknowledged," and the balance to be paid in lumber, in three instalments, by the 25th December, by H. D. Ballard, L. M. Ballard sold and conveyed to H. D. B. one



---

---

Ballard et al. v. Eckman & Vetsburg et al.—Statement of Case.

---

---

steam saw-mill, saw-frame, two guns, one corn-mill and lumber cart, and all mill fixtures, blacksmith tools, two yoke of oxen and wagon.

On the part of the defendants, *Frank L. Wilson* testified: When I got acquainted with H. D. Ballard he was bar-keeper, and I left. When I returned I found H. D. B. here in Bartow. Heard he had bought out Bevill, his partner in mercantile business, and moved to Medulla. I went there and got a job with him at saw-mill. He and others told me he was running a store there, and I bought goods from the store. When we settled he brought up what I was due for goods, and I my time. Know nothing about the ownership of the store except from hearsay. Know nothing of H. D. B. exercising acts of ownership over the store, only by selling goods to me and others, and they paying him for them, and he saying it was his. All the mill hands understood it was H. D. Ballard's, and he told us to go there and get the goods when we wanted them, and that the reason he had a store there was because he could pay off his mill hands without paying money. Saw two wagon loads of goods hauled from Bartow to Medulla, for H. D. Ballard from Bevill. L. M. Ballard kept the post-office in a corner of the store, and have seen him selling goods. H. D. B. went back and forth from mill to store, and I thought he had supervision of everything.

*A. T. Mann*, a witness for defendant, testified that H. D. Ballard, when in Bartow, ran a bar-room, and afterwards he and Bevill and Smith bought and run a saw-mill. He went in with Bevill in the mercantile business after he quit the bar-room. He owned some other property, houses and land. After that he bought Bevill's part of the goods and carried them to Medulla—three or four wagon loads of dry goods and hardware. Witness states that he was a witness to the first contract between H. D. and L. M. Ballard in

---

Ballard et al. v. Eckman & Vetsburg et al.—Statement of Case.

---

March. Heard the contract read, and looked over it. The payment was to be made in lumber, \$1,300, and the contract did not say anything about whether part of the payment had been made already. Heard from Henry Allen and H. D. Ballard that they tore up that contract and made another in about a week. After I witnessed this contract H. D. Ballard took charge of the mill. I bought goods from H. D. B. in the store.

*F. F. Bevill*, in behalf of defendants, testified: Was in the mercantile business with H. D. Ballard about a year, and was in the saw-mill business with him and Smith awhile. He owned a half interest in a block in Bartow, and a house and lot. We bought two and a half acres from Pearce and five from McKinney, and we entered 40 together. I sold him my interest in the mercantile business when we dissolved, about February 1, 1882. We had on hand in stock in the house \$1,138.02, and goods bought and in transit other goods, swelling the amount to \$1,821.38. H. D. B. assumed all the debts, and I turned over to him my interest in the stock of goods. These were the terms of the sale. There was about \$200 in cash on hand that was divided. The amount of liabilities he assumed was \$2,374. Some cotton had been shipped to some of the creditors in Savannah. He sold the land. H. D. Ballard has the reputation of an honest man. Cross-examined: When he bought me out he said he was going to carry the goods to Medulla. I saw a letter from Louis Ballard to him asking him to come up and buy out A. J. English, for he, L. M., could not.

*L. M. Ballard* testified: I did business on my account up to February last (1882). From February to July, I was employed in the store by H. D. Ballard. He (H. D.) owned the stock of goods, but the store-house was owned by myself. I sold him the stock of goods on February 8, 1882.

---

---

**Ballard et al. v. Eckman & Vetsburg et al.—Statement of Case.**

---

---

and the mill about 1st March. English's interest in the goods was half the stock, the whole valued at \$750, but I had to pay him \$400 to get him out. Immediately after the purchase I transferred the whole of my interest to Hiram Ballard. He paid me two mares and a buggy. There was some other trade payment, but I don't now remember what it was. I took the mares and buggy at \$400. There was a balance due me, which was placed to my credit in the store. I paid it out on the debts I owed to my neighbors, most of it. The \$400 paid to English was paid partly by me and partly by Hiram out of store. The whole interest of English and myself in the stock was paid for by H. D. I never at any time bought any interest in that stock of goods from H. D. Ballard. I afterwards sold him a steam saw-mill, lumber cart, two guns, wagon, two yoke of oxen and blacksmith shop. There was a contract, called a bill of sale. I first sold him the mill, payable in lumber entirely, and then there was a writing drawn up, but a few days later we made a different trade, and the first writing was torn up and another made. He paid me a yoke of oxen, some town lots amounting to \$550; there never was any other written contract in regard to the mill, only this paper and the one that was torn up; there was not any trade made or papers drawn up concerning the sale of the mill expressing that payment should be made in goods for the mill, or that goods had been paid for the mill. After I was employed by H. D. Ballard I had the management of the store. I never had any title or claimed any ownership to it; I never said or wrote to any body that I had any title or ownership; I made remittances for H. D. to complainants on account of F. F. Bevili & Co.; they never objected to application of the money so remitted on account of Bevill & Co. I heard part of Mr. Evers' testimony in regard to a conversation he says occurred on

---

---

Ballard et al. v. Eckman & Vetsburg et al.—Statement of Case.

---

---

the road to Savannah; Mr. Evers made the first proposition; he proposed that we put up a big store at Tampa, and break down the merchants there; my answer was, I doubted our ability; then I said I had better buy a big stock of goods and sell them out to you; that is all the conversation I ever had with him of that kind; we both laughed, and Evers said all right, and we drove off; I did not mean what I said in that proposition, nor do I believe that Evers meant it; I received a letter from Mr. Evers stating that the goods were mine, and to compromise this matter, and if I could not pay dollar for dollar, to pay what I could; I just answered him that I was not able to pay the matters; that it would leave my family in suffering condition; I did not deny or acknowledge the ownership of the goods in my answer, for I knew that he did not know anything about them. I did not acknowledge that the goods were mine, because I did not think it was any of his business. The goods were not mine. The amount exempted by the sheriff for me was all the personal property I had at that time. Since the closing of the bar-room business in Bartow, I have had no business interest with H. D. Ballard here; was not interested in the store of F. F. Bevill & Co., nor in the saw-mill, nor in real estate, nor in personal property. I have applied the proceeds of all property sold, as far as I could do, for the comfort of my family and to the payment of debts. I have not retained for myself as much of either personal or real estate as the constitution and laws of this State allow. The amount exempted for me by the sheriff was all the personal property I had at the time. Don't know what the exemption laws allow in this State.

*H. D. Ballard* testified: That he is the brother of Louis M.; I own a store at Medulla; I carried part of the goods from this place (Bartow), bought from Mr. Bevill; I

---

---

Ballard et al. v. Eckman & Vetsburg et al.—Statement of Case.

---

---

ght a part of the goods that were already there from Louis and part of the goods I have there I bought elsewhere, New York, Savannah and other places; bought at Medulla about \$750 from L. M. Ballard. It was owned by myself and Jack English; I talked with English about trade, and we agreed, but as some misunderstanding as to the property to be given, I left L. M. Ballard to set up the trade for English's interest. English sold the stock of goods, land and other property altogether. Louis took the land and I took the goods. The trade was made on the understanding that the goods were for me and the land for Louis. I paid for the goods in full, with money and other property of my own; I continued to own the store up to the time it was closed by the sheriff; I managed it part of the time myself, and Louis part of the time; I employed him, and sent the clerk to him, and he employed him; I know of no fraud or intention of fraud, when the trade was made; I have never sold any interest in the store; have never sold any stock except in the ordinary course of trade; never sold any of it for a saw-mill; carried to Medulla the stock of Bevill & Co., and goods bought for the company, in transit, of the value of eighteen hundred and twenty five dollars. A detailed statement submitted. After I had got the two stocks together, the stock amounted to about \$2,550, more or less, all of which belonged to me. I bought also other goods amounting to \$1,240, before the store was closed; I had a conversation with Mr. Hays; we owned a saw-mill together, and when we shut down this conversation occurred; I took the books and paid the hands from the store; Mr. Hays and I had a settlement, and I had paid the hands, but the mill owed for it; Hays wanted to leave the matter over until we came back from Orange county; I told him I could not do it; that I was not interested in the

---

Ballard et al. v. Eckman & Vetsburg et al.—Statement of Case.

---

store; this was all the conversation; we had other money that belonged to the mill business of Hays & Ballard, and settled up the store account; I made that remark to him because I was urging him to a settlement, that is, the remark that I owned no interest in the store. I run the mill separate from the store, and kept an account against myself, and Mr. Hays also; Mr. Hays was behind with me, and I did not want him to get in any further. As to the conversation mentioned by Mr. Booth. I told him I did not want to pay any money on the oxen; that goods were the same as money; that I was buying his oxen for the mill company, and the mill company was behind with me about \$75; I did not go into any further explanation with Mr. Booth. Witness then went into a detailed statement of his property when he went to Medulla and bought the store and mill, &c., from his brother, showing assets of about \$1,125, besides his interest in the Bevill stock of goods; his store and mill business was "paying," and up to the time the store was closed up he had paid debts of F. E. Bevill & Co. the amount of \$1,541.44; when the store was closed there was about \$2,200 in the store, according to the inventory; there is still unpaid of the indebtedness of Bevill & Co., payable out of that stock, \$847.85. I do not owe Louis M. Ballard anything, and he does not owe me; our matters have been settled; this balance was paid before the store was closed by his labor in the store. Witness refers to a memorandum from his books in which it appeared that L. M. Ballard had become indebted by his account at the store; witness says there never was a paper, to his knowledge, expressing that \$550 had been paid in goods, on the purchase of mill; that there was a paper (the first one) signed by L. M. Ballard, by which the purchase of the mill was entirely on time, to be paid in lumber; we tore up that paper, and changed the trade

---

---

allard et al v. Eckman & Vetsburg et al.—Opinion of Court.

---

---

e I wanted to make a payment; we drew a new con-  
showing a payment of \$550, and \$750 to be paid in  
r; this payment of \$550 consisted of a yoke of oxen  
ome land; since then I have paid all the lumber; the  
here is the identical paper I showed to Mr. Hays.

foregoing is the substance of the testimony appear-  
the record.

4. *Hanson* for Appellants.

*M. Sparkman* and *J. B. Wall* for Appellees.

THE CHIEF JUSTICE delivered the opinion of the court.

first and second grounds of appeal are the allowance  
liminary injunction on bill and petition without oath  
er proof of the allegations in either paper, and be-  
no bond was given as required by the order.

ther of these grounds, if sustained, will be sufficient  
move the final decree, because this appeal was not  
until the final decree had been entered, upon the hear-  
pon bill, answers and testimony. If the allegations  
e bill are supported by the testimony sufficiently to  
ome the answers of the defendants, the injunction  
inal decree may stand, even if the orders allowing the  
ninary injunctions were erroneously made.

t in view of the importance of the proceedings in this  
we ought not to hesitate to say that the allowance of  
ajunction upon the filing of the bill, and again, upon  
etition after the dissolution of the first writ, were un-  
rized, if the record sent here is correct.

e oath to the bill was made by one of the counsel,  
swears "that the facts set forth in the foregoing bill  
rue to the best of his knowledge, information and be-

It does not appear that he had any "knowledge"

---

Ballard et al v. Eckman & Vetsburg et al.—Opinion of Court.

---

of facts, or that he had any "information" of any kind from any source, or that he "believed" anything stated in the bill. He asserts neither. He does not swear to a single tangible fact showing any knowledge, any information, any belief whatever. The bill was not supported by the oath of anybody, and yet an injunction was allowed, restraining defendants from interfering with a store of goods worth over two thousand dollars; and the second injunction was allowed also upon a petition to which no oath was attached. We are inclined to believe that the record was imperfectly copied.

Such a verification as was made to the bill, according to this record, is not sufficient to justify the granting of an injunction. *Bowes vs. Hoeg*, 15 Fla., 403. When an injunction is granted without the oath of some person to facts, or to reliable information as to the facts stated in the bill, it is a matter of course to dissolve the injunction before answer, and the officer to whom the application for an injunction is made should require to be annexed to the bill the additional affidavit of the person from whom the information is derived, verifying the truth of the information thus given. *Campbell vs. Morrison*, 7 Paige, 157; *Bank of Orleans vs. Skinner*, 9 Pa., 305; *Horne vs. Moody*, 59 Ga., 731.

No receiver was named in the order in this case, but it appears by the return of the sheriff on the order that he had taken possession of the store and stock of merchandise. By what authority this was done does not appear. The presumption is that it was done by some authority of the court which does not appear in the record. The reputation and credit of no man of business is safe if he is liable to be enjoined from pursuing his occupation or the care of his property, and to have a receiver or sheriff put in possession of his effects upon a creditors' bill alleging fraud



---

---

Ballard et al v. Eckman & Vetsburg et al.—Opinion of Court.

---

---

in the most general terms, the truth of which no person asserts on oath.

As to the bond, we simply remark that it does not conform to the order of the court, not having been executed by the complainants, their agent or attorney; nor does it name all the complainants in the suit; nor is it sealed by the obligors; nor was its sufficiency approved. These were faults, but as before remarked, they cannot affect the regularity of the final decree.

It is alleged for error that the testimony of certain witnesses was improperly admitted, as their testimony does not bear against H. D. Ballard. This testimony relates to transactions and declarations intended to show fraudulent and irregular conduct on the part of L. M. Ballard. In this aspect it was competent as against the latter at least. As to the objections to the testimony, and to questions addressed to witnesses on their examination before the referee, the record fails to show that any questions of this character were made upon the hearing; and the omission of the court to rule specifically upon the matter is not the fault of the Judge. No motion appears to have been made to exclude or strike out any portion of the testimony. As the case comes here upon the pleadings and the testimony, we will examine the whole record, and endeavor to give the testimony such weight as we think it deserves.

The charge in the bill is very general. It is, that Louis M. Ballard, being indebted to complainants for goods sold to him in his business as a merchant, combined and confederated with H. D. Ballard, his brother, to defraud complainants, and transferred to his brother his stock of goods without consideration for the purpose of enabling the said L. M. Ballard to defraud complainants, and to evade payment of his just debts, complainants having obtained judgments amounting to \$2,296.85, and sued out executions

---

Ballard et al v. Eckman & Vetsburg et al.—Opinion of Court.

---

upon which they can find nothing to levy. The bill requires the defendants to answer certain interrogatories as to the indebtedness, the sale of the goods, for what consideration the sale was made, and whether it was not made to keep his creditors from seizing the stock of goods. This is the whole case made by the bill.

The answers show that prior to the recovery of the judgments, L. M. Ballard was engaged in trade with one English as a carpenter, each owning one-half interest in the goods. That the merchandise was of the value of seven hundred dollars, and there was some other property in the store worth fifty dollars. That H. D. Ballard was in similar business at another place, and desirous to remove to the store of Ballard & English he employed L. M. Ballard to purchase the interest of English. That L. M. Ballard purchased the interest of English in the stock for \$400, and sold the whole to H. D. Ballard for \$750, and delivered the goods to him. That H. D. Ballard paid L. M. Ballard in full for the stock before the filing of this bill, and removed his own stock into the store. The goods so brought in were of the value of \$1,821.38, making, with the goods purchased of Ballard & English, a stock of the value of \$2,571. That ever since the purchase by H. D. Ballard, February 8, 1882, he has had possession of the goods as his own property, and has been engaged there in his usual mercantile business, until his store was taken possession of by the sheriff in July, 1882, under these proceedings. That H. D. Ballard, before the seizure of the store, had bought for himself, in his own name, and put into the store, other goods of the value of \$1,240.84. They deny that the sale by L. M. to H. D. Ballard was fraudulent, or designed to defraud the complainants, or other creditors of L. M.; and aver that the sale was made in good faith, and for a full and valuable consideration; and give a detailed statement

---

Ballard et al v. Eckman & Vetsburg et al.—Opinion of Court.

---

of the consideration paid. Both defendants deny that L. M. Ballard had, at the time of the filing of the bill, or at any time subsequent to the sale, any interest whatever in the stock of goods. In brief, both defendants generally and specifically deny all the equities of the bill.

There was in evidence a written contract, showing that in March, 1882, Louis M. Ballard sold to H. D. Ballard a steam saw-mill and fixtures, oxen, carts, &c., for \$1,300, of which \$550 was acknowledged to be paid, and the balance to be paid in lumber.

The testimony on the part of the complainants as to the conversations and declarations of the defendants, standing uncontradicted, would go far towards showing that L. M. Ballard still had, after the sale to H. D. Ballard in February, 1882, an interest in the stock of goods, at least to the extent of the value of the goods of Ballard & English; but this testimony is met quite fully by that of each of the defendants, by such explanations and contradictions as are at least plausible; and as the defendants are competent witnesses we must give their statement such weight as should be given to other persons, making due allowance for the fact that they testify in their own interest.

The testimony of English is that the entire business when he went in was about \$2,500, and when he went out it was about \$1,900. The assets of the firm were the store-house, goods and accounts. He does not say how much he agreed to give for a half interest, but says he paid \$500, or thereabouts, in cash, and gave his note for the balance, and when he quit he owed \$400 on the note. It was evidently a losing business. The evidence shows that he was paid \$400 for his interest in the entire property when he sold out. The amount they owed at the time he sold is not shown. There is no evidence to contradict defendants' statements that the goods in the store were of the value of about \$750

---

---

Ballard et al v. Eckman & Vetsburg et al.—Opinion of Court.

---

---

when purchased by H. D. Ballard. It is shown that this was paid by H. D. Ballard before the filing of this bill.

The testimony as to what L. M. Ballard said about his embarrassments, and his desire to go into bankruptcy, and saving something for his family, as a reason for running the business in the name of English, was suspicious; but there is no shadow of testimony showing that H. D. Ballard knew of these facts. H. D. Ballard brought a large stock from the store of Bevill & Co., amounting to over \$1,800, and put into the store with the goods he bought of L. M., and afterwards put in other goods purchased of merchants, amounting to \$1,140, before the store was closed. The stock inventoried by the sheriff amounted to \$2,200, and upwards. H. D. Ballard shows he had other property amounting to over \$1,100, at the time he went to Medulla, besides his interest in the Bevill stock, with which he bought his brother's stock and invested in the saw-mill property. His business in the store and mill was profitable up to the time he was closed up, in July, 1882. His brother, L. M., had not been successful in business, but had run largely in debt. In the face of these facts it is difficult to believe that the stock of goods belongs to Louis M. Ballard, the judgment debtor. Hays testifies, and H. D. Ballard admits, that he told Hays that he was not interested in the store; and Ballard says that is all that he said on the subject. The reason he said it was that he and Hays were running the mill business together, and the mill concern owed the store, and Hays wanted more time on his part of the mill debt, and he didn't want Hays to get in any further. By this means he got a settlement with Hays. Hays does not again appear to contradict any part of this statement. What Ballard said to Booth was that if he gave an order on the store for the oxen, bought for the mill company, he, Ballard, would have to pay the store, and the mill

---

---

Ballard et al v. Eckman & Vetsburg et al.—Opinion of Court.

---

---

company was already behind with the store, and he didn't want to pay money for the oxen. Under the circumstances stated, there can be no conclusion that the purchase by H. D. Ballard of the goods of L. M. was fraudulent, and was designed to hinder the collection of the debts of L. M. Ballard.

The decree finds "that the sale by L. M. Ballard of the stock of goods in question was made without consideration, and for the purpose of defrauding the creditors of the said L. M. Ballard; and it further appearing to the satisfaction of the court that any interest in said stock of goods which may have been owned by the said Hiram D. Ballard had been transferred by him to said Louis, and there is no doubt that the entire stock is subject to the judgments and executions of the complainants," &c.

We cannot agree that the evidence in this record shows that Hiram D. Ballard made a fraudulent purchase of the goods of L. M. Ballard; nor is there any testimony here from which we can infer that Hiram D. afterwards sold the stock to L. M.

The charge in the bill was a general one of a combination to defraud creditors. The answers of both defendants deny generally and specifically the fraud charged, and show that the transaction was *bona fide*. The facts stated in the answers as to the consideration and the intent are pertinent to the charge made. These answers are not overcome by the testimony in the case. The testimony as to the facts accompanying the sale of the goods and the subsequent conduct of the business fully sustains the answers. Aside from what are shown by Hays to be the declarations of H. D. Ballard to him, there is no testimony throwing suspicion upon the title of H. D. Ballard to the store of goods at the time the bill was filed. The admission or declaration said to have been made to Hays is at variance

---

Ballard et al v. Eckman & Vetsburg et al.—Opinion of Court.

---

with the facts shown by other testimony. "With respect to all verbal admissions they ought to be received with the greatest caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say." 1 Greenl. Ev., Sec. 200.

The statement which Hays says was made to him by E. D. Ballard was made for the purpose, as Ballard swears, of inducing Hays to pay what he owed, as one of the mill company, to the store.

"The question of fraud is one of motive and intent, and can rarely, if ever, be considered as a single fact; but a conclusion, to be inferred from all the circumstances of the case. In the proof, however, the same general rule prevails in equity as at law; it is not to be presumed, but must be proved." Wilson vs. Lott, 5 Fla., 317, per Thompson, J. One in failing circumstances has a right to sell his property, and of course any one has a corresponding right to purchase. The only limitation upon the exercise of these rights is, that the sale and purchase be in good faith and for a valuable consideration. If the appellant's purchase falls within this rule—if he purchased from the vendor in good faith and for a fair price—it is perfectly immaterial whether the vendor was embarrassed or insolvent, or whether the condition of his affairs was or was not known to be vendees. Barrow vs. Bailey, 5 Fla., 25.

It is said by appellants that because the stock of L. N. Ballard, in the store when he sold it, was exempt from seizure for his debts, there could have been no fraud as to cred-

---

---

Price v. Metsger et al.—Syllabus.

---

---

rs in making the sale. While it is true that any sale or  
er disposition of the exempt property cannot be a fraud  
on creditors, who cannot subject such property to the  
rment of their demands; (see Bump on Fraudulent  
veyances, 2d Ed., 242, and citations;) yet it does not  
ear precisely what other personal property was owned  
L. M. Ballard, and it cannot be determined whether  
se goods might have been exempted. The question,  
efore, of exemption, does not necessarily enter into the  
e.

The decree is reversed, and the cause remanded, with di-  
ctions to dismiss the bill.

---

IN W. PRICE, APPELLANT, VS. GEO. L. METSGER ET AL.,  
APPELLEES.

P. filed a bill to foreclose a mortgage for \$1,000 executed by M. on  
land in range 35, alleging that S. purchased the land subject to  
the mortgage. Bill was taken and confessed against M., but S.  
pleaded that M. had a homestead claim on land in range 36, and  
under act of Congress afterward entered and paid for it and ob-  
tained the receiver's certificate, and then conveyed free of incum-  
brance to S.—S. not denying that he had purchased the mort-  
gaged land subject to the mortgage lien, answers that by an agree-  
ment between P. and M. the mortgage was given to secure P. for  
certain legal services, and that if he was unsuccessful the amount to  
be paid should be \$500 only, and that he was unsuccessful. The  
cause having been heard upon these pleadings the court held the  
plea good and dismissed the bill. Such decree was erroneous.  
The plea sets up nothing in bar as to the land in range 35, and  
the answer admits that the mortgage was a lien thereon to the  
amount of at least \$500.

If S. has no interest in the land mortgaged he cannot set up a de-  
fence as to the mortgage debt as it does not concern him.

---

---

Price v. Metsger et al.—Statement of Case.

---

---

Appeal from the Circuit Court for Brevard county.

Appellant filed his bill in chancery to foreclose a mortgage executed by Metsger on the 12th day of April, 1881, on land in Brevard county described as lots five and six and north half of southeast quarter of section one, township twenty-two, of range thirty-five, containing 169.78-100 acres to secure payment of a note for one thousand dollars given by Metsger to Price, due in one year. After the giving of the note and mortgage it is alleged Metsger sold and conveyed the land to Sackett subject to the lien of the mortgage. Metsger having become a non-resident of the State, notice was given by publication, and a decree *pro confesso* was entered against him.

Defendant Sackett, by plea and answer, says: That he admits the giving by Metsger of the note and mortgage set out in the bill, but says the note was executed to secure Price for professional services in the defence of one Morris Metsger indicted for murder, and it was expressly agreed between Price and Metsger, that in case said Morris should be acquitted of the charge, Price should receive the sum of one thousand dollars, but if Morris was convicted, Price should receive but five hundred dollars for his said services. That Morris was convicted and hung for the crime, wherefore he insists that Price was entitled to receive only the sum of five hundred dollars.

Sackett further says that the said Metsger had entered under the homestead laws of Congress lots five and six, and the north half of the southwest quarter of section one, in township twenty-two, of range thirty-six, containing about 146.90-100 acres, and on the 12th day of August, 1881, Metsger paid for the land, at the land office, and received the receiver's certificate therefor, and on the 22d day of August, 1881, sold and conveyed the same to defendant, Sackett, and defendant insists that under the



---

---

Price v. Metsger et al.—Opinion of Court.

---

---

laws of the United States land entered as a homestead cannot be subject to the satisfaction of any debt contracted prior to the issuing of a patent therefor. R. S. of U. S., 2,296.

Complainants excepted to the answer as insufficient, and showing no defence to the bill, and afterward the cause was heard upon the bill and the plea of Sackett, and the Chancellor decreed that the plea was a good plea to complainant's bill, and that the bill be dismissed. From this decree complainant appeals.

*John W. Price in pro per.*

*Scott & Thrasher* for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

The bill shows, and the plea and answer admit the execution of the note and mortgage by Metsger, which mortgage conveyed to complainant certain lands in township twenty-two, of range *thirty-five* in Brevard county, being 169.78-100 acres. A decree *pro confesso* was entered, after notice by publication as to Metsger, the mortgagor. The bill charges that after the execution of the mortgage, Metsger conveyed this land to Sackett, subject to the lien of the mortgage.

The plea and answer of Sackett do not deny that the mortgaged land was conveyed by Metsger to Sackett, subject to the mortgage lien; but aver that by the agreement between Metsger and complainant the note and mortgage were given to secure payment for the complainant's professional services as a lawyer for defending Morris Metsger, and that the compensation was to be but five hundred dollars in case Morris was convicted of murder in the first degree, and that Morris was not acquitted, but was convicted and hung.

---

---

Price v. Metsger et al.—Opinion of Court.

---

---

The defendant, Sackett, alleges by plea that he purchased of Metsger another parcel of land in township twenty-two and range *thirty-six*, containing 146.90-100 acres, which Metsger had entered as a homestead, and afterwards purchased from the United States. This is not the same land described in the mortgage, nor is it anywhere alleged in the pleadings to be the same land intended to be mortgaged. The defendants' plea, therefore, relating to the homestead land in range thirty-six, sets up no matter of defence to the bill.

If the defendant, Sackett, was, as the bill alleges, the purchaser of the mortgaged land, subject to the lien of the mortgage, such land is chargeable, at least to the extent of the five hundred dollars which Sackett says was the amount due to complainant. If Sackett was not the purchaser of the mortgaged land, he has no standing entitling him to plead that the whole amount of the mortgage debt is not due from Metsger, as it does not concern him.

There having been no plea or answer showing any fact going to defeat the foreclosure of the mortgage upon the land in range thirty-five, it is plain that the decree that the plea was a good plea, and that the bill therefore be dismissed, must have been produced by a misapprehension in respect to the pleadings.

In the present state of the pleadings, the other questions presented by counsel are not involved in the case.

The decree is reversed.

---

---

Eldridge et ux. v. Wightman & Christopher—Opinion of Court.

---

---

LEWIS H. ELDRIDGE ET UX., APPELLANTS, VS. WIGHTMAN & CHRISTOPHER, APPELLEES.

Decree *pro confesso* must be reversed where the record discloses that it is based upon an order striking out a plea, which order does not appear to have been made after entry of the motion to strike on the chancery order book or after notice of any other character to the defendants.

Appeal from the Circuit Court for Volusia county.

The facts of the case are stated in the opinion.

*John W. Price* for Appellants.

*J. M. Barrs* for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

Wightman & Christopher filed their bill on the 21st April, 1880, against Eldridge and wife. They allege that on the 27th of June, 1879, Lewis H. Eldridge was indebted to them in the sum of two hundred and fifty dollars, evidenced by five promissory notes for fifty dollars each, payable on the first day of January, February, March, April and May, 1880, respectively; that defendants owning a parcel of land in Volusia county, Florida, on which was a dwelling-house, executed a mortgage thereon to secure the payment of the said notes, principal and interest, together with all costs, charges and expenses, including a reasonable attorneys fee in collecting the money by a foreclosure of the mortgage; that the said notes and mortgage are now due since due. Plaintiffs pray foreclosure, &c. After appearance for L. H. Eldridge, we find marked as filed on the 27th of June, A. D. 1880, a paper, which, after that por-

---

Eldridge et ux. v. Wightman & Christopher—Opinion of Court.

---

tion of the address of a plea which states the title of court in which the cause is pending, proceeds thus:

WIGHTMAN & CHRISTOPHER,	}	Foreclosure of mortgage —
vs.		
L. H. ELDRIDGE.		

“The defendants, without admitting any of the statements or charges contained in said bill, says for a plea, say, that the promissory note for the sum of fifty dollars, named and described in said mortgage and for the payment of which it was made to secure, and became and was due on the first day of January, A. D. 1879, was paid by and assigned to William B. Watson and afterwards paid by and delivered to this respondent. He therefore says, alleges and charges that the said bill filed to foreclose said mortgage is illegal and filed contrary to law and equity, and ought of right to be dismissed. He therefore prays that said bill be dismissed,” &c. This paper is signed by the attorney of L. H. Eldridge. It is also sworn to by the attorney in this language:

“STATE OF FLORIDA,        }  
   “County of Volusia.        }

“Before me personally came John W. Price, who being sworn says that he has read the foregoing plea and knows the contents thereof, and that the same is true so far as stated on his own knowledge, and that as to those things stated on information and belief he believes to be true.”

JOHN W. PRICE.

Sworn to and subscribed before me, June 7, 1880.

This paper is marked “filed June 7, 1880.”

We next find a paper without any file mark, but dated June 28th, 1880. This paper is a direction to the clerk to “enter a decree *pro confesso*, for want of plea, answer or demurrer,” and is signed by complainant’s solicitors, “Walker

---

**Eldridge et ux. v. Wightman & Christopher—Opinion of Court.**

---

& Owens.” The record discloses no action upon this paper.

We next find this:

“WIGHTMAN & CHRISTOPHER	}	Foreclosure of mortgage. Motion to dismiss.
“vs.		
“L. H. ELDRIDGE.		

“Defendants’ counsel will please take notice that plaintiffs will move to strike the plea in above cause as insufficient as soon as motion can be heard.

“E. K. FOSTER & BARRS,  
“Attorneys for Plaintiffs.”

Motion granted.

WILLIAM ARCHER COCKE, Judge.

Entered December 13th, 1880.

JNO. W. DICKENS, Clerk.

STATE OF FLORIDA, }  
County of Volusia. }

I, John W. Dickens, Clerk of the Circuit Court in and for Volusia county, do hereby certify that the foregoing is a true transcript of the records of my office, taken from Chancery Order Book, page 207.

JNO. W. DICKENS, Clerk.

On the 7th of March, 1881, we find an order taking the bill for confessed on the ground of failure to file any further pleading after striking out the plea. On the 30th of March, 1881, we find a decree appointing a master to take an account. There was an account, a final decree, and a sale of the mortgaged premises. From the final decree rendered upon the master’s report this appeal is taken.

All of these pleadings, including the order striking the plea, must be reversed and the cause be remanded to stand upon that plea.

There is no evidence in this record, constructive or otherwise, that any notice of the motion to strike the plea was

---

Eldridge et ux. v. Wightman & Christopher—Opinion of Court.

---

given the defendants, or either of them. On the contrary, looking at the entry as it stands, it would appear that ~~the~~ motion was made before the Judge and granted, and afterwards placed in the order book. Defendants here insist that they had no notice of this motion and the record discloses none. The paper itself as copied in the record does not appear to have been entitled in the cause, and while the certificate of the clerk is that he takes it from the order book, yet there is nothing to show that the notice of motion was ever placed on the order book before the order was made. An entry of this motion in the order book under the rules would have been notice of the motion. Whether special notice of the time of hearing such motion is required we do not determine, as there was here no notice of the motion itself.

The defendant was not in default.

We have had occasion in a recent case to treat of orders taking bills for confessed and decrees *pro confesso*, *nisi* and absolute. *Stribling et ux. vs. Hart, Extrx., et al.*, 20 Fla., 235. Such an order is a serious matter not to be set aside without cause. Upon appeal from a final decree of this character the regularity of the proceedings anterior to the order taking the bill for confessed is the subject of review here. The plea we think amounts to nothing in form or substance. It is wanting in the formal requirements under the rule, and the note, the payment of which it sets up, it is apparent is not one of those claimed in the bill of complaint ~~as~~ being due plaintiffs, as they claim no note due January 1, 1879.

The decree is reversed, and all proceedings anterior to it and subsequent to the motion to strike out the plea are ~~set~~ aside and the case will be remanded to stand upon the motion to strike the plea.

---

---

Chessser & Cone v. DePrater—Opinion of Court.

---

---

**ES M. CHESSER AND W. A. CONE, SHERIFF, APPELLANTS, VS. M. DEPRATER, APPELLEE.**

Bill alleges that M. was the owner of the improvements on land of the United States held and occupied as a homestead under the laws of the United States, and C., with the assent of M., sold the improvements and the possession of the land to D. for a valuable consideration partly paid, and C. gave to D. a writing reciting that he had sold his interest to D., and containing the following: "This is to show that I do stand good to M. D. for the above premises as a homestead for himself under the acts of Congress granting of homesteads to actual settlers." D. went into possession and made valuable improvements, and was proceeding to take necessary legal steps to secure a homestead title when C. clandestinely procured from the United States Land Office a certificate of entry of the land in the name of M. and then a deed from M. to himself and instituted proceedings against D. to oust him: *Held*, That the bill shows the conduct of C. was a violation of his agreement and a fraud upon the rights of D., and C. was estopped from asserting the right of possession against him; that C. is deemed a holder of the legal title in trust for D., and upon payment by D. of the balance due to C. upon the sale of improvements and possession, with interest from the time it became due, he will be entitled to a conveyance of the legal title if the allegations of the bill are sustained.

Appeal from the Circuit Court for Volusia county.

The facts of the case are stated in the opinion.

John W. Price for Appellants.

Cott & Thrasher for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

DePrater, complainant, filed his bill alleging that on the 1 day of February, 1881, he entered into a contract of purchase with defendant, James M. Chessser, for a certain

---

 Chesser & Cone v. DePrater—Opinion of Court.
 

---

parcel of land known as the Marlow homestead, in Volusia county, of which contract the following is a copy:

“Know all men by these presents that I have this day sold my rights and claims of the premises of the Marlow place, known as the Marlow homestead, lying and being in Volusia county, Florida, and described as follows: In section 30, township 14, range 28, east, bounded east by John D. Baker, and south by State, west by James M. Chesser and H. E. Osteen homestead, north by S. R. Causey’s homestead. This is to show that I do stand good to M. DePrater for the above premises, as a homestead for himself, under the acts of Congress granting of homesteads to actual settlers. Note.—It is required of the homestead settler that he shall reside upon and cultivate the lands embraced in his homestead entry for a period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years from the expiration of said five years he must file proof of his actual settlement and cultivation, failing to do which his entry will be cancelled. If the settler does not wish to remain five years on his tract he can at any time after six months pay for it with cash or land warrants, upon making proof of settlement and cultivation from date of filing affidavit to the time of payment, &c. Signed in presence of these witnesses, this February 3d, 1881.

“JAMES M. CHESSE—

“MARY MANNING, }  
 “SUSAN DEPRATER.” }

The bill alleges that sometime previous to the making of the contract the land had been entered and occupied by one Marlow, under the homestead laws of Congress, but before the final proof of occupancy Marlow died, and his widow sold out her interest to Chesser, appellant, and an aban-



---

---

**Chesser & Cone v. DePrater—Opinion of Court.**

---

---

done it. After complainant's purchase he was proceeding to take the necessary steps to obtain title from the U. S., and with the knowledge and consent of Chesser and Mrs. Marlow he entered a contest of the Marlow homestead, with a view to cancel it, and to enter it as a homestead for himself. The consideration of the sale by Chesser to him was \$75, of which he paid down \$5.50, and immediately entered into possession, with the knowledge and consent of Chesser, and began the construction of a dwelling-house and other valuable improvements on the land, and is still in possession. That subsequent to the date of the contract of purchase defendant Chesser, contriving and seeking to injure and defraud him, and to prevent his obtaining a title, and to defeat his right of possession under the contract, in a clandestine manner procured, through Mrs. Marlow, from the U. S. Land Office a receipt showing that she was entitled to a patent for the land, under act of Congress, by purchase; and Chesser then procured a deed from Mrs. Marlow for the land, and now holds the deed. Chesser then commenced proceedings before the County Judge to evict complainant, and judgment was rendered against him by the Judge, and a writ was issued, directing the sheriff to put Chesser in possession.

Complainant avers that by the terms of the contract Chesser agreed to "stand good" to him for the premises "as a homestead for himself under the acts of Congress," thereby engaging to aid and not to prevent him from consummating his homestead entry of the land, and insists that the subsequent acquisition of title by Mrs. Marlow's entry thereof at the land office, and by her conveyance to Chesser, enured to complainant's benefit, and that Chesser holds the said title as a trustee for complainant. An injunction is prayed restraining the execution of the writ of possession, and a decree is sought declaring complainant's inter-

---

 Chesser & Cone v. DePrater—Opinion of Court.
 

---

est in the premises, and requiring Chesser to convey ~~the~~ same to him or payment of the balance of the purchase money due by the agreement, which complainant is ready and willing to pay as may be decreed, and that he may have such other and further relief, &c.

Chesser demurred to the complaint for want of equity, and that the complainant's remedy is at law.

The court overruled the demurrer and granted an injunction, from which decree defendants appeal.

The appellant's counsel, in his brief, undoubtedly puts a proper construction upon the contract, to-wit: That Chesser, at the date of the written agreement, owned the improvements on the land, the title of which land was in the U. S., the improvements having been made by Marlow under a homestead entry, the right to which homestead entry was in the widow of Marlow, upon his death, under the act of Congress of Jan. 21, 1866, (U. S. Rev. Stat., §2291,) and which improvements were sold to complainant by Chesser, who put complainant in possession with the assent of Mrs. Marlow, and that Chesser, by the contract, "agreed to aid the complainant in any way he could to obtain the same as a homestead."

Appellant insists that this, as a bill for specific performance, cannot be maintained because defendant Chesser did not agree to make a title to complainant. But this is not a bill for specific performance, and the authorities cited on that subject have no application to the circumstances of this case. Mrs. Marlow's homestead rights and the improvements were property of value which may be sold. Taylor vs. Baker, 1 Fla., 245. On her abandonment of the land it reverted to the United States, (Rev. St., Sec. 2297,) and any person by contesting the homestead right, on abandonment by the widow Marlow, may have the homestead

---

---

Chesser & Cone v. DePrater—Opinion of Court.

---

---

cancelled, and himself enter the land. Act of Congress, May 14, 1880, Chap. 89, Secs. 2, 3.

From the terms of the written agreement it was clearly the intention of the parties that complainant would proceed to make good his right of homestead entry with a view to obtaining a title from the United States under the acts of Congress. The defendant Chesser, by his argument, not only undertakes to assist complainant in all legitimate matters, but agrees to throw no obstruction in the way of accomplishing what was contemplated. Instead of "standing good to" complainant in the matter, he, through Mrs. Marlow, in some manner procured a certificate of entry from the land office entitling Mrs. Marlow to a patent, and secured a conveyance from her to himself, and seeks to dispossess complainant after he had paid part of the purchase money for the possession and improvements, and made considerable improvements on the land with a view to entering a homestead.

By assuming to sell an interest to complainant, Chesser admits to have an interest, and is estopped from denying it.

It then has a clear case of an admission by defendant, intended to influence the conduct of the man with whom he is dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless defendant be cut off from the power of retraction.

It is I understand to be the very definition of an *appel in pais*. For the prevention of fraud the law makes the admission to be conclusive." *Dezell vs. Odell*, 11 Ill., N. Y., 215, 219, 251; *Welland Canal Co. vs. Hawkey*, 8 Wend., 481, 483; *Cowen & Hill's Notes*, vol. 54 to 464; notes by Edwards.

The procuring of the certificate of entry from the land office, thus making Mrs. Marlow the owner of the land, and then obtaining a conveyance to defendant Chesser, was

Chesser & Cone v. DePrater—Opinion of Court.

an act of bad faith, and an attempt to defraud complainant after he had been put into possession by defendant, under the circumstances stated, and had made valuable improvements on the land; and it is the province of a court of equity to interpose and prevent the consummation of the fraud. The defendant is estopped by his own agreement and conduct from assuming by a subsequent purchase of the legal title any attitude contrary to that contemplated by the agreement.

An estoppel is where a man is concluded by his own act or acceptance; Co. Litt., 352, A; and it may be by writing or *in pais*. Com. Dig., tit. *Estoppel*. There is no principle in law better settled than that if a man sell and convey land to which he has no right or title, but afterwards buy or acquires a title, he cannot claim it against his grantee. Root vs. Crock, 7 Barr., 378. All the authorities agree in this, and the principle is applicable to the circumstance stated in this bill. After having entered into an agreement to stand by this complainant in securing a homestead entry under the laws of Congress, he has no right to so change the circumstances as to defeat the complainant in his legitimate efforts to effect a homestead entry, or otherwise to impair the right thus acquired by complainant against his express agreement.

This defendant assumed to be the owner of the improvements and to have the right of possession, and sold them to complainant for a valuable consideration, and delivered possession. He has now placed it beyond the power of the complainant to obtain a homestead title from the United States by obtaining a title to himself. Equity should save the party attempted to be wronged.

Defendant Chesser is a purchaser with full notice of the complainant's rights, and upon the principles announced in Brush v. Ware, 15 Peters, 93, he may be deemed to hold

---

 Smith v. Longe—Opinion of Court.
 

---

legal title in trust for complainant; and upon compliance by the latter with the terms of the contract by paying amount remaining due for the purchase of the possession and improvements, with interest from the time it became due, he should have a decree for a conveyance of the legal title, if upon the hearing the allegations of the bill be established.

The decree of the Chancellor allowing an injunction and ruling the demurrer is sustained, with costs against the appellant.

---

ALFRED L. SMITH, APPELLANT, vs. CHAS. A. LONGE, TAX COLLECTOR OF DAYTONA, APPELLEE.

As the levy of general municipal taxes upon real and personal property in 1882 was not authorized by law, the power to assess having been abrogated by chapter 3024, laws of 1877, and the sale of land for taxes attempted to be levied in that year was properly enjoined. A dissolution of the injunction was erroneous.

Such injunction will not operate to prevent the future collection of taxes, the levy of which was validated by chapter 3477, laws, approved March 5, 1883. The validity of that act was sustained in the case of city of Jacksonville vs. Basnett, decided at this term.

Appeal from the Circuit Court for Volusia county.

The facts of the case are stated in the opinion.

John W. Price, for Appellant.

Scott & Thrasher, for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the Court.

Appellant filed his bill for an injunction to restrain the collector of taxes from selling the real property of com-

---

 Smith v. Longe—Opinion of Court.
 

---

plainant for taxes alleged to have been illegally assessed. The Board of Aldermen of Daytona, on the 23d day of January, 1882, attempted to levy a tax of one per centum on the taxable property, and an assessment and tax roll was made out with warrant annexed and delivered to the collector in April, 1882, for the taxes of that year, as is alleged, and the collector advertised the property of complainant and others to be sold for such taxes. Such levy of taxes is alleged to have been illegal and void for several reasons stated. It is understood that the tax was a general and not a special tax, and that it was levied for general municipal purposes.

The defendant answers that the tax was in fact levied on the assessment made for the year 1881 to pay the expenses of the year 1881, and not of 1882 as the bill alleges, there having been a failure of the Assessor to complete an assessment in 1881. An injunction was allowed on filing the bill, but upon the answer the court made a decree dissolving the injunction and ordered the complainant "to pay such legal costs as may have or may hereafter accrue in this cause." The order was made September 19, 1880, and this appeal is from that order.

Under the act for the organization of municipal governments passed in 1869 the Aldermen were authorized to levy taxes upon real and personal property, and there was also authority to tax and license certain business and privileges. The twenty-third section of the act contained the authority to levy taxes on property, but by an amending act passed in 1877 (chapter 3024, section 8) the power to levy such taxes was abrogated, and so the law remained until 1883. See Basnett vs. City of Jacksonville, 19 Fla., 664.

The result is that at the time of the attempted levy of the tax in Daytona in 1882 that corporate body had no power to tax real and personal property for general municipal

---

---

Smith v. Longe—Opinion of Court.

---

---

cipal purposes, and the order granting the injunction was the proper remedy to prevent the sale of complainant's real estate and the creation of an apparent cloud upon the title. It also follows that the subsequent order dissolving the injunction and awarding costs against complainant was erroneous.

It is but just to say that the question of the repeal of the power of general taxation as it had existed under the twenty-third section of the act of 1869 was not discussed or considered when this case was before the Chancellor, but his action was apparently controlled by the allegations of the pleadings as to the time and manner of the assessment. These matters we find it unnecessary to consider, as the want of power to levy the tax in 1882 is decisive of this case, there having been no lawful right, of course, to advertise and sell plaintiff's property, which is the subject of this complaint.

In 1883, however, the Legislature passed an act, chapter 3477, approved March 5, restoring the power of general taxation contained in the original section 23 of the act of 1869, and prescribing the method of assessment, limiting the tax and restricting appropriations. The third section legalizes assessments made before the passage of the act by the city or town authorities in accordance with the rules prescribed in the preceding sections, and authorizes the future collection of taxes so assessed, without regard to the time of the assessment or to any municipal ordinance. This act was considered by this court in a case in which its validity was questioned and it was sustained. We held that "if the assessment was such as the Legislature could have authorized at the time, it can validate it for future action by the city under the newly granted power." *City of Jacksonville vs. Basnett et al., supra.*

If then the tax in question was such as might have been

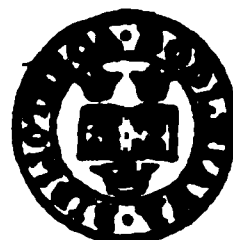
---

 Street et al. v. Benner et al.—Statement of Case.
 

---

assessed if the act of 1883 had been in force at the time it was assessed, the corporate authorities of Daytona may now enforce the collection.

The judgment of the court is that the decree vacating the injunction is reversed, but the injunction will not operate to prevent the collection of taxes heretofore levied in conformity with the provisions of the act approved March 5, 1883, chapter 3477. Appellant will recover costs incurred in this appeal.




---

THADDEUS STREET, ET AL., APPELLANTS, VS. MARY S.  
BENNER, ET AL., APPELLEES.

1. A decree in partition appointing commissioners and directing them to ascertain the interests of the parties, and to make partition accordingly, is irregular. The court should ascertain and adjudicate the several interests of complainants and defendants, and direct the commissioners to make the division accordingly.
2. A decree of partition should not be made until the defendants shall have answered or a decree *pro confesso* is entered as to those who have been summoned by subpoena or by publication.
3. A court of equity is not the proper tribunal for trying the legal title to lands; but by the statutes of this State regulating proceedings in partition, where the bill shows the court has jurisdiction, and the complainant's title is put in issue by the defendant's pleadings, the court is authorized to "ascertain and adjudicate the rights and interests of the parties," and decree a partition "if it shall appear that the parties are entitled to the same," without requiring the legal title to be first tried in a court of law.

Appeal from the Circuit Court for Volusia county.

Bill for partition filed July 14, 1877, by appellants, who claim that they and certain others named are heirs at law of their grandfather, Timothy Street, who died intestate in



---

---

Street et al. v. Benner et al.—Statement of Case.

---

---

3, and of Henry Street, the son of said Timothy, who in 1860. The allegations are that the Spanish Government granted to Joseph Delespine a tract of land now in Alachua county containing about 43,000 acres, which grant was confirmed by the decree of the Superior Court of the District of East Florida and by the Supreme Court of the United States in 1838, and a patent for the land embraced in the grant by survey was issued by the President of the United States on the 17th day of October, A. D. 1873, to 43,031 38-100 acres, to the heirs of Joseph Delespine, Michael Lazarus, Enoch Wiswall and John Drysdale. The land is situated in townships 22 and 23, south, and ranges 35 and 36, east.

Joseph Delespine conveyed by deed February 28, 1822, Michael Lazarus an undivided one-half of the tract.

Michael Lazarus conveyed December 13, 1823, the same undivided one-half to Timothy Street, the grandfather of the plaintiffs.

Joseph Delespine on October 21st, 1824, conveyed to John Drysdale an undivided one-tenth.

Joseph Delespine on December 17th, 1827, conveyed to Enoch Wiswall 18,450 acres.

The confirmation of the grant by the court as above mentioned was upon proceedings instituted by the heirs of said grantees.

The parties named as defendants in this suit are alleged to have derived interests by conveyances or otherwise from John Drysdale and Wiswall and by a mortgage executed by Joseph Delespine on 18,000 acres June 14, 1825, to Bancroft & Company, of New York.

The prayer of the bill is that the undivided half of the 43,031 38-100 acres, to-wit: 21,515 69-100 acres be assigned and set off to them and the other heirs of said Timo-

---

 Street et al. v. Benner et al.—Statement of Case.
 

---

thy Street, and that commissioners be appointed for the purpose.

The answer of Mary S. Benner, F. M. Bouta, administrator of the estate of Hiram S. Benner and others named in the bill as granted under Drysdale: (1.) "Denies that the complainants or any of them were the owners of the premises alleged" at the time of the commencement of the suit. (2) Alleged that neither complainants, their ancestors, predecessors nor grantors were seized or possessed within seven years before suit. (3) The cause of action did not accrue within seven years before suit. (4.) Not within seven years prior to the 12th of December, 1861. (5) — That these defendants, their ancestors, predecessors or grantors have been in continued adverse possession for seven years last before suit founding such occupation, claim and possession upon a written instrument being a conveyance of the premises. (6.) Possession adverse to the pretended title of complainants for seven years under a written conveyance.

Mary S. Benner and others plead that the complainants have no standing because they were out of possession and had no title; and the defendants, Mary S. Benner, Allan, Chas. H. Benner, Ella Benner, C. B. Coffin J. Boye and Josephine Hughes were in adverse possession and occupation, founding such possession upon a written conveyance.

May 18, 1878, the bill was dismissed on bill, answer and plea, on motion of defendant's counsel.

May 5, 1879, bill re-instated with leave to each amend.

June 27. Replication to plea and answer filed.

September 13, 1881. Decree that a partition of the premises be made among the several parties in interest deriving from either of the patentees, and that cert

---

---

**Street et al. v. Benner et al.—Statement of Case.**

---

---

‘appointed commissioners to ascertain the number of  
s each of the respective parties in interest are entitled  
y virtue of said letters patent or any conveyances made  
the said patentees or their grantees and to partition,  
rate and segregate the several interests of the respect-  
parties, having due regard to the quality and value of  
land. And in case the lands cannot be equitably di-  
d by metes and bounds without doing injustice to the  
ies in interest, or any one of them, to so report to this  
t.”

ne defendants at the hearing objected to the deeds and  
mony introduced on the part of the complainants, on  
ground that the testimony went to the trial of the title  
ne defendants who claim under a deed from the State of  
ida, which trial cannot be had in this proceeding.

eptember 19, 1881, the commissioners filed their re-  
dated September 17th that by virtue of the decree they  
“proceeded to examine the title papers” of the prem-  
and find that the original title emanated from the gov-  
ernment of Spain and was a grant by Spain to Joseph Dele-  
e made April 9, 1817. That Delespine in 1822 con-  
d to Michael Lazarus an undivided one-half; to John  
dale an undivided one-tenth October 31, 1824; a mort-  
to Bancroft & Pope of 18,400 acres June 14, 1825;  
on December 17, 1827, a deed to Enoch Wiswall of  
50 acres. That Michael Lazarus conveyed by deed his  
vided one-half to Timothy Street, who was the ances-  
of the plaintiffs, December 23, 1824. They find the  
of the undivided one-half, viz: 21,515.79 acres in the  
of Timothy Street, to-wit: Thaddeus Street, Henry  
street, Timothy Street, Cecilia Street, Samuel A. Street,  
lia DuFau, Amelia LeRoy and Septima Morel.

hey further find that Enoch Wiswall conveyed to John  
Thorpe, Alexander Thorpe and Christian Delevan, Mor-

---

 Street et al. v. Benner et al.—Statement of Case.
 

---

dicia L. Marsh, portions of the undivided quantity derived from Delespine; and that the administrator of Drysdale sold to Geo. R. Fairbanks the undivided one-tenth, which was thereafter conveyed to W. Allan, portions of which were conveyed by Allan to Hiram Benner and Mary S., his wife, to wit: the undivided one-tenth part of about seventy-five sections, which are enumerated, and other portions were conveyed to others of the defendants herein.

The commissioners then proceed "to find that the title" of parts of the entire tract is in several parties separately designated and the number of acres to which each is entitled. They find the lands cannot be equitably divided among the several parties and recommend that the whole be sold.

September 20, 1881. The court decreed that the commissioners make a sale.

October 18, 1881. Defendants, Benner *et al.*, filed exceptions to the commissioners' report.

November 21, 1881. Commissioners filed a petition asking leave to withdraw their report recommending a sale and say they have become satisfied that there should be partition of the lands.

November 25, 1881. The court made an order suspending the order of sale and granted leave to the commissioners to amend their report.

Jan. 3, 1883. Solicitors for Mary S. Benner *et al.*, move to dismiss the suit, or strike off, vacate and set aside all orders and proceedings since the filing of the plea and answer on the ground that the title of complainants being denied and an adverse possession claimed by these defendants, the same were a complete bar to further proceedings until complainant's legal title was established at law.

February 3, 1883. "This cause came on to be heard upon the bill, answer and other papers filed in the cause

---

---

Street et al. v. Benner et al.—Statement of Case.

---

---

and was argued by counsel, whereupon upon consideration thereof, it is adjudged, ordered and decreed that all orders and proceedings herein had are hereby set aside and the bill dismissed."

In July, 1877, there was an order of publication to absent defendants. Affidavits of publication were filed, but there appears in the record no decree *pro confesso* as to these absent defendants and no appearance by them.

H. A. Delespine appeared by solicitor and demurred to the bill as an heir at law of Joseph Delespine, but he does not seem to be a party to the suit and his demurrer was unnoticed.

There is at the end of the record a paper purporting to be a copy of a deed executed by D. Eagan, Com. of Lands and Immigration of the State of Florida, dated 28th February, 1874, conveying to Hiram Benner and Mary S. Benner, his wife, and their heirs, &c., an undivided interest to the extent of 36,900 acres in a Spanish grant confirmed to Joseph Delespine, containing 42,956 38-100 acres, embracing section 1, T. 22, S., R. 34, E.; Sec. 1, T. 23, S., R. 34, E.; Sec. 1, T. 22, S., R. 35, E.; Sec. 1, T. 23, S., R. 35, E., for the consideration of \$1,573.66, the said land having been sold 5th July, 1852, and conveyed by the sheriff as tax collector of Orange county to the State for \$1,555.66, taxes due and unpaid thereon. This deed of the Commissioner of Lands, &c., purports to have been made in pursuance of an act to quiet tax titles, approved Feb. 27, 1872. This copy of deed is indorsed: "Filed at chambers Jan. 3, 1883," by the Judge. A separate paper, sent up under the order of the Judge as the deed used before him, is certified by a Notary Public of N. Y., to be a copy of a deed executed by Eagan, Commissioner of Lands and Immigration to Hiram Benner and Mary S. Benner, has these endorsements: "Filed at chambers Jan. 11, 1883;" and "this

---

Street et al. v. Benner et al.—Opinion of Court.

---

paper filed at chambers Jan. 11, 1883, was before me when the case was tried. Wm. Archer Cocke, Judge, June 21, 1883."

From the decree setting aside the proceedings and dismissing the bill, complainants appealed.

*C. P. & J. C. Cooper* for Appellants.

*R. B. & J. W. Archibald* for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the Court: This is a bill filed by complainants for a partition of lands. It shows by direct allegation and by exhibits that complainants and others named, in whose behalf partition is sought, are co-partners, being heirs at law of their ancestor, who had title by deeds of conveyance from the grantee of the King of Spain, to the extent of an undivided one-half of forty-three thousand acres. This grant having been confirmed by proper proceedings under acts of Congress, a survey was made by the Surveyor General and a patent issued by the President of the United States designating and locating the grant by proper descriptions and boundaries, thereby assuring to the heirs and grantees of the original grantee, Joseph Delespine, 43,031 38-100 acres as the complement of the Spanish grant made to him in 1817.

The bill shows that Joseph Delespine conveyed to Timothy Street, the ancestor of complainants, an undivided one-half; to John Drysdale an undivided one-tenth; that he mortgaged to Bancroft & Pope 18,400 acres, and conveyed by deed to Enoch Wiswall 18,450 acres. The defendants named in the bill are grantees under John Drysdale and Enoch Wiswall, and the assignees of the mortgagees, Bancroft & Pope.

Such statement shows that the complainants and the de-

---

Street et al. v. Benner et al.—Opinion of Court.

---

defendants are “tenants in common and parties interested” in the lands sought to be divided, and presents a proper case for proceedings in partition under the statute.

The defendants, Mary S. Benner and others, who are alleged to be grantees under Drysdale, appeared, pleaded and answered that complainants, or either of them, had no possession or title to the premises; and that neither the complainants, their ancestors, predecessors or grantors were seized or possessed within seven years before suit; and that these defendants, their ancestors, predecessors or grantors have been for seven years before suit in continued adverse possession and occupation founded upon a written conveyance of the premises.

Upon bill, answer and plea, the court dismissed the bill. This is alleged for error, but if error, it was atoned by an order reinstating the bill. After this complainants filed their replication.

More than two years afterwards there was entered a decree that a partition be made of the lands described among the parties in interest, deriving their titles from either of the patentees, and appointing commissioners to ascertain the number of acres each of the parties was entitled to and to make partition thereof, or if partition could not be properly made to report to the court.

It does not appear that any default or decree taking the bill as confessed had been taken against a large number of defendants who had not been served with process and some who had been served and who had not appeared, though there had been an order of publication and publication made. Nor does it appear that testimony had been taken or presented to the court, though there appears in the record a written objection signed by defendants’ counsel “to the deeds and testimony introduced on the part of complainants” on the ground that it involved the “trial of the

# SUPREME COURT.

Street et al. v. Benner et al.—Opinion of Court.

le of defendants who claim under a deed from the State of Florida." What "testimony" is referred to is left to conjecture. No testimony appears in this record. It was the duty of the court "upon the bill being taken as confessed, or upon the coming in of the answers of the defendants," to "proceed to ascertain and adjudicate the rights and interests of the parties, either by a reference to master or by a hearing upon the pleadings and proof, or such other way or manner as may be most convenient, according to the ordinary rules and practice of the court, and shall also decree that partition be made if it shall appear that the parties are entitled to the same." A March 14, 1844, Sec. 4, Thomp. Dig., 384; McC. Dig. By section 5 of the same act, "upon a decree of partition being made the court shall appoint three suitable competent persons to act as commissioners in making a titution decreed, \* \* \* who shall proceed to make a partition of the premises in question according to the order of the court."

The decree in this case does not show that the court proceeded to "ascertain and adjudicate the rights and interests of the parties." Neither the rights and interests of the complainants nor of the defendants were ascertained or adjudicated, but the decree in terms directs the court to ascertain the several interests and then to make a partition as they shall ascertain such interests from patents and conveyances made by the patentees or their grantors. No such power can be given to the court.

it is the province of the court to "ascertain the rights and interests and adjudicate them by its decree. As in 17 Ves., 533.

The decree of September 13, 1881, was erroneous and inoperative, as it gave the court no guide to their proper duties.



---

**Street et al. v. Benner et al.—Opinion of Court.**

---

Four days after the entry of this decree the commissioners reported that they had examined the title papers and ascertained the titles of the several parties, and also that the 43,031.38 acres lying in five townships could not be equitably divided. Thereupon the court decreed a sale of the whole, without disposing of exceptions that had been taken to the report.

After the entry of the decree of sale the commissioners filed their petition stating that they had been informed and were satisfied that the lands could and ought to be divided and asked leave to withdraw their report. Thereupon the court suspended the order of sale and gave leave to file an amended report, which, however, they failed to do.

In February, 1883, the court, on motion of the solicitors for Mary S. Benner and others, made a decree setting aside all orders and proceedings and dismissed the bill.

So far as can be discovered from the record this decree is the only one which adjudicated and determined the rights of the several parties. To the extent that this decree vacated the order of September 13, 1881, purporting to decree a partition and appointing commissioners and subsequent proceedings thereunder it should stand, but we find no ground for dismissing the bill. As before remarked, the bill shows that complainants and others claiming under Timothy Street have title in possession to an undivided one-half of these lands and the defendants have certain interests in the other undivided half, and this makes a case for a partition. *Liscomb vs. Rue*, 8 Pick., 376; *Miller vs. Denne*, 6 N. H., 109; *Barnard vs. Pope*, 14 Mass., 434.

There was no demurrer to the bill by any of the defendants as to matters of form or substance.

There is in the record a paper purporting to be a demurrer to the bill by one H. A. Delespine, but he is not a party

## Street et al. v. Benner et al.—Opinion of Court.

to the suit, and no notice was taken of this paper by the court.

From all we can learn from this (badly made-up) record, if the proper parties are before the court, the cause would have been ready for its action had a decree *pro confesso* been entered as to such defendants as had not appeared after due service or notice. There is no decree *pro con.* here.

The bare denial of complainants' title by plea or answer was no obstacle to the court's proceeding, according to the ordinary practice of courts of equity in partition, and did not necessitate a reference to a court of law to try the legal title. Freeman on Cotenancy and Partition, §502.

If a mere denial of the title were sufficient to oust a court of chancery of jurisdiction in partition and authorize the dismissal of the bill, the court could never proceed against the wishes of an unscrupulous defendant. The defendant must answer the bill, and if he sets up a title adverse to the complainants, or disputes the complainants' title he must *discover his own title* or show *wherein* the complainants' title is defective. Lucas vs. King, 2 Stock. Ch., 280.

The defendants, Benner *et al.*, merely deny complainants' title and allege an adverse possession "founded on a written conveyance," but do not disclose the defect in complainants' title nor discover the written conveyance under which they claim adversely to the complainants.

The general practice in chancery, as established by the books, uncontrolled by statutes, is, that when the complainants' title or the co-tenancy is denied, or the answer sets up an adverse holding, and the defence is substantiated by proof, to require the plaintiff to establish his title at law, and to retain the bill a reasonable time to enable him to do so by his action at law. Freeman, §501; Horton vs. Sledge, 29 Ala., 478, 493, and citations.

---

---

Street et al. v. Benner et al.—Opinion of Court.

---

---

The decree dismissing the bill does not state the grounds of this action of the Chancellor.

There appears at the close of the record a paper purporting to be a copy (certified by a New York Notary) of a deed of conveyance by the Commissioner of Lands and Immigration in behalf of the State to Hiram Benner and Mary S. Benner, his wife, of an undivided interest to the extent of 36,900 acres in a Spanish grant to Joseph Delepine of 42,956.38-100 acres, embracing sections numbered one in four several townships, the same having been sold to the State in 1852 for taxes.

This paper, according to the Judge's endorsement, was filed with him and was "before" him "when the case was tried." Whether it was considered in evidence or rejected, if offered by either party, does not appear. We cannot think it was considered as 'evidence, because it was not such a paper as could be received, except by consent, under any known rule of law. And if it were in evidence it is not clear what effect it may have upon the complainants' interest. This paper, therefore, probably did not control the action of the court in dismissing the bill.

The question whether, under the statute of this State, the court of chancery can try and determine a contested legal title in a suit brought for the sole purpose of effecting a partition of lands, has never been decided. The case of *Mattair et al. v. Payne*, 15 Fla., 682, is cited as deciding that question, but the only thing decided there touching the subject was that the legal title could not be tried in that case, involving, as the bill on its face there did, a large number of complicated matters improperly joined, and incidentally it was said that equity was not the proper forum for trying the legal title to land, and that a decree of partition could not be had until the legal title was established. The bill itself showed the absence of complainants' right.

---

---

Street et al. v. Banner et al.—Opinion of Court.

---

---

This was entirely correct according to all authorities, whether the proceedings were at law or in equity. The very nature of this proceeding contemplates a division of land among *owners* in common.

Where the *object* of a suit is to try a question of legal title the proper forum is a court of law. Where there is a partition of lands among common owners or persons severally interested in an undivided estate, a court of equity is the forum; and (unless the statute otherwise directs) the practice has generally been that upon an issue being made involving the title, and upon investigation indicating that there was a real question of legal title to be decided, the court should suspend action until a court of law could determine the title. Freeman on Cotenancy and Partition, §§501, 502.

In several of the States the courts having jurisdiction over partition are entrusted with more ample powers than those elsewhere exercised by courts proceeding in conformity with the common and statute law of England.

This is particularly the case in regard to disputes concerning the title. Such disputes may in some of the States be tried and conclusively determined in equity. A necessity exists for referring any of the issues to a court of law for trial. Freeman, §503; Godfrey v. 17 Ind., 9; Wolcott vs. Wigton *et al.*, 7 Ind., 17; vs. Davis, 38 Mo., 107; Parker vs. Kane, 22 Mo., 107.

The statute of March 14, 1844, regulating procedure in partition was not referred to in Mattair v. Banner, and its construction was not required in that case, the matter having been decided upon the bill alone.

As the bill in this case was doubtless dismissed upon the ground that the legal title attempted to be determined by the plea and answer, it is proper to refer to the statute with reference to the jurisdiction

---

Street et al. v. Benner et al.—Opinion of Court.

---

chancery in suits brought for the purpose of partition of lands. The second section requires the bill or petition to set forth the description of the lands, the names and places of residence of the several owners, tenants in common or parceners or other persons interested, the quantity or proportionate share held or claimed by each, as far as may be known, "and such other matters as may be necessary to enable the court to adjudicate fully upon the rights and interests of the parties." By section four, it is provided, (as before quoted,) that "upon taking the bill as confessed, and upon the coming in of the answers the court shall proceed to *ascertain and adjudicate the rights and interests of the parties*" according to the most convenient method and according to the ordinary rules and practice of the court, and shall also decree that partition be made, if it shall appear that the parties are entitled to the same," from such examination.

The English use of the term "adjudication," is to express the act of giving judgment. *Tomlin. Adjudicate*: To determine in the exercise of judicial power. Synonymous with adjudge in the strictest sense. A solemn or deliberate determination by the judicial power. *Abbott's L. Dict.*

Construing this statute according to the ordinary rules of construction, the direction to the court to "ascertain and adjudicate the rights and interests of the parties" involved on the issues made by the pleadings upon the evidence to be taken and submitted according to the usual methods of procedure in chancery, is nothing less than a direction to decide and decree what these respective rights are as they may appear from the law and the testimony. There is nothing in the act requiring the court of chancery to ascertain what the verdict of a jury might be upon the facts, but the court must ascertain and decide the rights and interests of the parties upon the evidence before it.

---

---

Street et al. v. Benner et al.—Opinion of Court.

---

---

“In Great Britain, a Chancellor might have considered this as a case in which to take the opinion of a court of law. \* \* \* But such a proceeding could not be expected in a State where the power of the courts of law and equity are exercised by the same persons.” *Parker Kane*, 22 How., 1, 17; per *Campbell*, J.

The plain meaning of the statute seems to be that a proper issue made in a suit for the partition of lands, shall be tried and determined by the court in which the proceeding is commenced and according to its rules, and whatever investigation is necessary to enable the court to adjudicate the rights and interests of the parties, may be conducted by it. Having the power the court should exercise it.

The prayer of the bill is that the undivided one-half of the tract which was conveyed by *Delespine* to *Lazarus* and by him to *Timothy Street*, be set apart from the other undivided half in which the defendants are alleged to have joint or several interests, without seeking to sever the interests of the defendants as among themselves. If the complainants are entitled to such partition it may be made as to their portion without segregating the portions of the several defendants, who may not desire such partition, “leaving for future adjustment by further proceedings the rights, shares and interests” of the defendants.

In thus disposing of this case we do not determine that the parties named as complainants should not make the other persons mentioned in the bill as being co-tenants in interest with them, parties in the proceeding, as complainants or defendants.

The decree dismissing the bill is reversed and the cause remanded with directions that all orders and decrees made on and subsequent to September 13, 1881, be set aside, and that further proceedings may be had consistent with the rules and practice of the court.

---

---

**Hayden v. Thrasher et al.—Statement of Case.**

---

---

[N. B.—Judgment for costs of this appeal will be entered against Mary S. Benner, Charles H. Benner, William Allan, Charles B. Coffin, Sophia Hunt, Francis J. Boye and Josephine Hughes, appellees, they being the defendants who procured the decree of dismissal.]

---

**JULIUS A. HAYDEN, APPELLANT, VS. L. A. THRASHER, ET AL., APPELLEES.**

1. While the general rule is that an injunction will be dissolved upon answers denying all the equities of the bill, yet where parties are charged with fraud, unless the answers are *full and satisfactory*, the injunction, if right in the first instance, ought to be retained until the hearing.
2. Mere denials of fraud, or of fraudulent intent, without a full explanation of the facts disclosed in the bill and in affidavits filed in support of the bill, leave the question of fraud unsettled.

Appeal from the Circuit Court for Orange county, to which the case was brought from Marion county.

The bill of complaint is, omitting the address, as follows:

Julius A. Hayden, of Orange county, Florida, brings this his bill against Barton H. Thrasher, Barton H. Thrasher, as trustee for his wife, L. A. Thrasher and her children, and William A. Dickenson, all of Alachua county, Florida, and Early W. Thrasher, in his individual capacity and as trustee for his wife and children, and George W. Means, as trustee for Mattie S. Means and her children, all of Marion county, Florida, and thereupon your orator complains and says: That on the first day of June, 1875, the defendant, Barton

---

---

Hayden v. Thrasher et al.—Statement of Case.

---

---

H. Thrasher, came to your orator and requested him to indorse six promissory notes made by William L. Thrasher, (a brother of Barton H.) in all amounting to \$14,500. Your orator agreed to do it if made secure against loss in the event that said notes were not paid at maturity, and said Barton H. Thrasher told your orator that said notes would first be indorsed by himself and his brother, Albert M. Thrasher, and that William L. Thrasher would convey to your orator unincumbered property worth \$30,000 as indemnity against loss. That by appointment with said Barton H. Thrasher your orator went to the office of said Thrasher on the second day of June, 1875, and there met Barton H., Albert M. and William L. Thrasher, who are brothers, and sons of the defendant, Early W. Thrasher, and there found prepared six notes signed by William L. Thrasher, payable to his own order, and indorsed by him and then by his brothers, B. H. and A. M. Thrasher, all dated June 2d, 1875, and payable at 6, 12 and 18 months after date, with interest from date, one for \$2,000 and five for \$2,500 each.

Your orator having all confidence in the assurances of said Barton H. Thrasher indorsed said notes and took from William L. Thrasher a conveyance of certain real and personal property as indemnity against such indorsement, said property being in Fulton and Morgan counties, in the State of Georgia, which the said Barton H. Thrasher assured your orator to be free from incumbrances of every kind, which statement of Barton H. Thrasher your orator then believed to be true, and by said statement and said assurance was induced to indorse said notes, believing that he would be protected in any event, he, the said Barton H. Thrasher, having also assured your orator that said notes would be promptly paid at maturity, and your orator then believing that said William L., Barton H. and Albert M.



---

---

Hayden v. Thrasher et al.—Statement of Case.

---

---

Thrasher were solvent and responsible. That soon after the indorsement of said notes your orator left the office of said Barton H. Thrasher, leaving said notes with Barton H., William L. and Albert M. Thrasher, (who remained in said office) and never saw them again till after their maturity; that at the time that he indorsed said notes and took said conveyance as indemnity as aforesaid there existed a judgment against the said Early W. Thrasher in the Superior Court of Morgan county, Georgia, for a very large sum of money, the precise amount, and the name of the plaintiff, not now being remembered by your orator, (but which your orator asks leave to insert in this bill when ascertained) and said Early W. Thrasher had (as allowed by the laws of Georgia) executed a stay bond to the plaintiff on said judgment staying the proceedings under said judgment for the time permitted by law; and his said sons, William L. Thrasher, Barton H. Thrasher and Albert M. Thrasher, had signed said bond as securities thereto, which said bond and the said judgment had become and was from the date of said bond a lien upon all the property of the said securities, and was at the time that the aforesaid conveyance from William L. Thrasher to your orator was executed a lien upon the property so conveyed by said W. L. Thrasher to your orator.

Your orator charges that the statement so made as aforesaid to your orator by the said Barton H. Thrasher, viz: that said property was free from incumbrance was false; that said Barton H. Thrasher knew at the time that said judgment against said Early W. Thrasher existed and that said stay bond had been given, and that said William L. Thrasher, whose property had been conveyed to your orator as indemnity against his said endorsement, was one of the sureties on said bond, yet the said Barton H. Thrasher concealed said facts from your orator, well know-

---

---

Hayden v. Thrasher et al.—Statement of Case.

---

---

ing that your orator would not have indorsed said notes he had known of the existence of said judgment and stay bond, (your orator then having no knowledge of the fact and that said property was not free from incumbrance. And your orator believes, and so charges, that the said statements so made to your orator by the said Barton H. Thrasher, and the said procurement of your orator's indorsement upon said notes, was the result of a conspiracy and confederation between the said Early W., Barton H. Albert M. and William L. Thrasher to injure and defraud your orator in the premises, they well knowing that said William L. Thrasher, the maker of said notes, and Barton H. and Albert M. Thrasher, the prior indorsers thereof were insolvent, and that neither of them was able to pay, and that they did not intend or expect to pay said notes when they should mature.

Your orator charges that at the time of said transaction the said Early W. Thrasher was insolvent and is still insolvent, and that he and his sons, Barton H., William L. and Albert M. Thrasher, were then purposing to remove to the State of Florida from the State of Georgia, where they then resided, and that they had no credits and could not raise money on their own notes, and that their object in procuring your orator's indorsement was to raise money on his credit, which they knew to be good, for the purpose of carrying out their plans.

Your orator further charges, on information and belief, that after said notes were then indorsed the same were disposed of either by distributing the same among the said Early W., Barton H., Albert M. and William L. Thrasher, or by procuring a discount of the same and distributing the money among themselves. That part of it was used to pay some notes signed by B. H. & A. M. Thrasher, and by Barton H. Thrasher as an individual. That part was taken

---

---

Hayden v. Thrasher et al.—Statement of Case.

---

---

by Early W. Thrasher and part by Barton H. Thrasher; and that said notes passed by transfer into the hands of the following parties who discounted the same, viz: One for \$2,000 to F. L. Freyer, one for \$2,500 to A. B. Merriam, one for \$2,500 to J. B. Tanner, one for \$2,500 to John Neal, and two for \$2,500 each into the hands of R. H. Richards, Cashier of the Atlanta Savings Banks.

Your orator charges that Barton H. Thrasher bought from Samuel C. Means a half interest in one hundred and ten acres of land in Marion county and paid him therefor \$5,000, and that he bought the remaining interest in said tract from George W. Means, trustee for his wife and children, and paid him therefor \$5,000, as will appear by Exhibits A and B hereto attached, containing a full description of said land, and which are made a part of this bill; which said payments were made either in whole or in part with the said money, which said Barton H. Thrasher had received from the discount of said notes or the notes themselves, and that if any part of said payment was made with other funds the same was Barton H. Thrasher's own money and not money held by him in trust, and that said Thrasher was at the time of said purchase and payments insolvent, and that he had no money which he held in trust for his wife and children, and that he took the deeds to said property in his name as trustee for his wife and children for the purpose and with the fraudulent design of preventing the holders of said notes and your orator from subjecting said land to the payment of said notes.

Your orator further shows that on the day that said Barton H. Thrasher bought said half interest from George W. Means, trustee, said George W. Means, trustee, entered into a written contract with him by which he agreed if said Thrasher so demanded at the expiration of three years to pay back to said Thrasher as trustee the said sum of \$5,000

---

---

Hayden v. Thrasher et al.—Statement of Case.

---

---

with interest at 15 per cent. per annum thereon; and as security therefor mortgaged to said Thrasher a certain tract of land fully described in said contract, a copy of which is attached as part of this bill and marked Exhibit C.

Your orator further charges that at the time that said Early W. Thrasher got part of said notes or of the proceeds thereof, neither of his said sons was indebted to him either individually or as trustee, but that he either got the same as a voluntary gift knowing that it had been fraudulently procured, or got it as his part of the result of the conspiracy above mentioned to defraud your orator, to which conspiracy he was a party.

Your orator charges that said Early W. Thrasher used said notes or the proceeds thereof as follows, viz: He bought fifty acres of land from George W. Means, trustee, to-wit: Beginning at the southeast corner of section 31, township 7, range 21, and running north 20 chains, thence west 25 chains, thence south 20 chains, thence east 25 chains to point of beginning, and paid therefor \$800, besides a considerable sum that he used to improve the property, and took the title either in his own name or as trustee for his wife and children; your orator not having been able to see the deed thereto cannot speak with certainty as to how the deed was made, but asks leave to attach a copy as an exhibit when the same can be secured; that said Early W. Thrasher having had two of said notes in his possession, falsely pretended to lend the same, viz: Amounting to \$4,500, or \$5,000, to Barton H. Thrasher, and said Barton H. used the same in paying George W. Means for said half interest so purchased, which said sum of money so paid to said George W. Means is the money which said Means agreed to refund at the expiration of three years as hereinbefore stated; that said Barton H. Thrasher and his

---

---

**Hayden v. Thrasher et al.—Statement of Case.**

---

---

er, the said Early W. Thrasher, still further intending defraud your orator and to fix said property and the proceeds of said note in such manner as to keep your orator and the holders of said notes from subjecting the same to the payment of said notes falsely pretended that said two notes so described were only loans to said Barton H., as trustee, and he, the said Barton H., in furtherance of said design, executed and delivered to his said father, Early W. Thrasher, a mortgage upon about thirty acres of said land bought by him from S. C. and G. W. Means, as a pledged security for the pretended loan of said notes by Early to said Barton H. Thrasher, trustee, which said mortgage embraced the orange grove and house which said Means agreed to purchase back as aforesaid, which said mortgage your orator charges to be without consideration fraudulent and void.

Your orator shows that at the maturity of said notes the William L. Thrasher, the maker thereof, refused to pay the same, and the said B. H. and A. M. Thrasher likewise refused to pay the same, and suits were brought by the holders thereof against your orator who was the only party who had property out of which the same could be collected. Of three of said suits are still pending and undisposed of,

One in the Superior Court of Fulton county, Georgia, in favor of J. B. Tanner for \$2,500, and interest; one in the Circuit Court of the United States for the Northern District of Georgia in favor of R. H. Richards, Cashier, for \$2,500, and interest, (viz: on two notes for \$2,500 each) and one in the Supreme Court of Georgia in favor of John L. Thrasher for \$2,500, and interest, the same being a writ of error from the City Court of Atlanta, which court had rendered a judgment against your orator. That judgments have been entered in the Circuit Court of the United States for the Northern District of Georgia, in two suits on said notes

---

 Hayden v. Thrasher et al.—Statement of Case.
 

---

against your orator, viz: One in favor of F. L. Freyer ~~for~~ \$2,800, principal and interest, besides cost, and one in fa~~vor~~ of A. B. Merriam for \$3,510, for principal and intere~~st~~ besides costs. That your orator employed able counsel a~~nd~~ defended said suits as far as he was able to do according t~~o~~ law, and is still defending the suits now pending.

That *fi. fas.* issued on said judgments and were lev~~ied~~ upon your orator's property in Atlanta, Ga., and your o~~ra~~tor to save said property from sale was forced to pay ~~on~~ the 3d day of January, 1879, the amount of said two judg~~me~~nts, to wit: the sum of \$6,510 78-100.

Your orator further shows that soon after the indorse~~me~~nt by him of said notes, a *fi. fa.* issued upon the afo~~re~~ mentioned judgment from the Superior Court of Morga~~n~~ county, Ga., against the said Early W. Thrasher, was lev~~ied~~ upon the property which William L. Thrasher had con~~ve~~veyed to your orator as indemnity as aforesaid, and whic~~h~~ said Barton H. Thrasher had assured your orator to be un~~in~~cumbered.

That this was the first information that your orator had received of the existence of said judgment and stav~~ing~~ bond, and that he at once inquired of said Barton H. Thrasher for an explanation thereof; that said Thrasher who was and is an attorney-at-law assured your orator again that the property was free from incumbrances, and that it was not subject to levy and sale under said *fi. fa.*, and your orator filed his claim thereto and employed able counsel to contest the same and carried said cause to the Supreme Court of Georgia, at great cost, to wit: about \$500.00, and said Supreme Court held that the said prop~~erty~~ was subject, whereupon the said property was sold un~~der~~ and applied to the payment of said *fi. fa.*, and thus be~~came~~ lost to your orator who was then left without any se~~cu~~rity whatever against loss by his said indorsement, an

---

---

Hayden v. Thrasher et al.—Statement of Case.

---

---

your orator has reason to apprehend and does apprehend that judgments will be rendered against him as indorser in each of said suits now pending against him, and that in addition to the sum already paid he will have to pay about \$15,000 or other larger sum in satisfaction of the same. And your orator says that by reason of the insolvency of the said Barton H. Thrasher, William L. Thrasher, Albert M. Thrasher and Early W. Thrasher, he will be without security to save himself from total loss of said amount unless he can obtain the relief hereinafter prayed.

Your orator shows that F. L. Freyer, as a collateral proceeding in this suit against your orator on said note held by Freyer, filed his bill in the Circuit Court of Marion county, Florida, against Barton H. Thrasher, as trustee, and procured from said court an injunction against said Thrasher, Trustee, restraining him from selling or incumbering any part of the property so bought by him from S. C. and G. W. Means, as aforesaid; that after said judgment had been rendered against your orator as aforesaid, and after your orator's property had been levied upon and advertised for sale thereunder, which sale was to have been made on the 7th day of January, inst., (which fact was known to said Barton H. Thrasher, and he likewise knowing that said judgments would certainly be satisfied by that time either by sale of said property or by payment by your orator,) the said Barton H. Thrasher still further designing and intending to defraud your orator by preventing him from subjecting said property so bought from S. C. & G. W. Means to the payment of said debts, moved to dissolve said injunction and set said motion for a hearing before the Chancellor at Gainesville, Fla., on the second day of January, instant, well knowing that as soon as said Freyer's judgment against your orator was paid on the 7th of January the said injunction would cease and be vacated.

---

 Hayden v. Thrasher et al.—Statement of Case.
 

---

And said motion was heard on said 2d day of January and said injunction was dissolved with the statement the Chancellor to said Thrasher that he would allow complainant's solicitor twenty days within which to move to reinstate said injunction.

Your orator further shows that immediately after, viz: on the same day, or the following day, after said injunction was dissolved, the said Barton H. Thrasher still further designing to injure and defraud your orator, and hinder him in the collection of his claim, combined, colluded and confederated to that end with his said father, Early W. Thrasher, and with the defendant, William A. Dickenson, (they, the said Early W. Thrasher and William A. Dickenson, knowing that said bill, filed by said Freyer was still pending, and that twenty days had been allowed for a motion to reinstate said injunction,) and falsely and fraudulently pretended to sell to said Dickenson the said house and orange grove containing five acres, as part of the one hundred and ten acres bought from S. C. and G. W. Means, which five acres was to be taken back by G. W. Means, Trustee, as hereinbefore set forth, (the three years within which it was agreed that said Means was to redeem it not having expired, but lacking only eight days of expiring,) and made a conveyance of the same to said Dickenson, (a copy of which your orator asks leave to attach as an exhibit as soon as the same can be had). Your orator has not had access to said deed of conveyance, and does not know what consideration is stated therein, but your orator charges on information and belief that said conveyance was without any consideration whatever, and was fraudulent and made for the purpose of covering up said property from the creditors of Barton H. Thrasher, and particularly to prevent your orator from reaching the same.

Your orator further charges on information and belief



---

---

Hayden v. Thrasher et al.—Statement of Case.

---

---

That said Barton H. Thrasher, Early W. Thrasher and William A. Dickenson, designing to defraud your orator pretending that said conveyance to said Dickenson, by said Barton H. Thrasher, was a *bona fide* sale for value; he, said Early W. Thrasher cancelled or transferred to said Dickenson the pretended and fraudulent mortgage which the said Early W. Thrasher, held on said property pretending that said Dickenson had not and has not paid him anything therefor; and the said Barton H. Thrasher and the said Wm. A. Dickenson still further confederating to defraud your orator, the said Barton H. Thrasher purchased fromannon a lot in the town of Gainesville, in Alachua Co., for the sum of \$786.50, or about that amount, and had the deed hereto made in the name of said William A. Dickenson, which deed your orator has not had access to, as the same has not been recorded and is in possession of said defendants or one of them, and said Thrasher is now having built hereon a fine and expensive residence, said lot being described as follows: The southwest corner of block four in range five, in the town of Gainesville, being on the corner of Pine and Church Streets, being 98¾ feet on Pine Street and fifty feet on Church Street. And your orator further charges that said Barton H. Thrasher and William A. Dickenson still further designing to defraud and hinder your orator, he, the said Barton H. Thrasher, transferred to said Dickenson the said contract and mortgage from said Means to said Thrasher, he, the said Dickenson, paying nothing therefor, and said transfer being fraudulent, and that said Means still owns the full amount thereof.

Your orator charges that said Barton H. Thrasher is now insolvent, and that he has not the means, either in his own right or as trustee, to purchase said lot and build said residence, and that if the said lot was paid for by said Dickenson, and if the building thereon is being paid for by said

---

 Hayden v. Thrasher et al.—Statement of Case.
 

---

Dickenson, it was and is being done for the purpose of changing the investment made by said Barton H. Thrasher of the funds procured by him upon your orator's said indorsements, so as to mislead your orator and hinder him from collecting the amounts so paid out by him as aforesaid, and to hinder the holder of the other notes upon which suits are now pending and your orator from collecting the amounts thereof.

Your orator further charges, on information and belief, that said Barton H. Thrasher turned over to said Dickenson the crop of oranges raised on said land, and that the said Dickenson is paying in part for said building with the income derived from said orange crop raised on said land bought by Barton H. Thrasher with the money raised from your orator's indorsement as aforesaid.

And your orator charges that unless the said defendants be restrained as hereinafter prayed they will dispose of said property to innocent purchasers and will incumber the same in such manner as will defeat your orator's rights in the premises, and thus cause him to suffer irreparable damage.

All which actings and doings of the said defendants is contrary to equity and good conscience, and inasmuch as your orator is without remedy of law he prays as follows: 1st. That the State's writ of injunction be granted, to be directed to the said defendants, Barton H. Thrasher, in his individual capacity and as trustee for his wife and children, to Early W. Thrasher, in his individual capacity and as trustee for his wife and children, to George W. Means, as trustee for his wife and children, and to William A. Dickenson, restraining the said Barton H. Thrasher, as trustee or in his individual capacity, from selling, mortgaging or conveying or in anywise incumbering said one hundred and ten acres of land by him purchased from S. C. Means and

---

---

**Hayden v. Thrasher et al.—Statement of Case.**

---

---

George W. Means, trustee, to wit: Part of section five of township twelve of range twenty-one, in Marion county, Florida, bounded as follows: Commencing at the northwest corner of said section, and running east along the section line 33 chains and 17 links, thence south 33 chains and 17 links, thence west 33 chains and 17 links to the western boundary line of said section, and thence north along said section line 33 chains and 17 links to point of beginning; and restraining the said Barton H. Thrasher, in his individual capacity or as trustee, and the said William A. Dickenson from selling, conveying, mortgaging or in anywise incumbering that certain lot in the city of Gainesville known as the property bought from said Cannon, and described as the southwest corner of block 4, range 5, being on the corner of Pine and Church Streets, being  $98\frac{3}{4}$  feet on Pine and 50 feet on Church Street, and from selling, conveying, mortgaging or incumbering the same or the said house, orange grove and five acres of land in Marion county, part of the said one hundred and ten acres bought by said Thrasher from S. C. and G. W. Means, which house, grove and five acres of land the said Barton H. Thrasher conveyed to said Dickenson, and from transferring, assigning or collecting said mortgage contract made by Geo. W. Means, trustee, to Barton H. Thrasher, trustee, and by said Thrasher transferred to said Dickenson, as well as said mortgage from B. H. Thrasher, trustee, to Early W. Thrasher, and restraining said George W. Means, trustee, from paying to said Thrasher, Dickenson, or their agents or assigns, the said sum of five thousand dollars and interest as set forth in said mortgage, and restraining the said Early W. Thrasher, as trustee or in his individual capacity, from selling, transferring, conveying, mortgaging or otherwise incumbering the said fifty acres of land as bought by him from Geo. W. Means, trustee, as aforesaid, described as follows: Beginning

---

 Hayden v. Thrasher et al.—Statement of Case.
 

---

at the southeast corner of section 31, township 7, range ~~2~~1,  
 running north 20 chains, thence west 25 chains, then ~~—~~ ~~ce~~  
 south 20 chains, thence east 25 chains to point of begi~~—~~ ~~in-~~  
 ning, and that the said one hundred and ten acres ~~so~~  
 bought by the said Barton H. Thrasher, as trustee, and t~~he~~  
 said fifty acres so bought by the said Early W. Thrash ~~er~~  
 in his own right or as trustee, and the said lot in the tow~~n~~  
 of Gainesville so bought by the said Barton H. Thrash~~er~~  
 from Cannon and conveyed to him or to said Dickenson, ~~or~~  
 so much thereof as may be necessary, be sold and the pr~~o-~~  
 ceeds thereof be applied to the payment of the said sever~~al~~  
 sums so paid out by your orator, as hereinbefore set fort~~h~~,  
 and the balance applied to the payment of said notes ~~on~~  
 which suits are now pending against your orator, and t~~he~~  
 said George W. Means may be required within such tim~~e~~  
 as to your honor may seem meet to pay into the registry ~~of~~  
 this court the said sum of five thousand dollars, with in~~te-~~  
 rest, according to the terms of his said contract with Ba~~r-~~  
 ton H. Thrasher, and upon so doing that he be decreed ~~to~~  
 have good title to said five acres of land so agreed by hi~~m~~  
 with said Thrasher to be redeemed, said amount to be a ~~p-~~  
 plied to the payment of the amount due to your orator and  
 due on said notes now in suit as aforesaid, and that in d~~e-~~  
 fault of such payment by said Means your orator be su~~b-  
 rogated to all the rights of the said Barton H. Thrash~~er,~~  
 trustee, and said William A. Dickenson under said contra~~ct~~  
 and mortgage from said Means to said Thrasher, and th~~at~~  
 said mortgage be foreclosed and said mortgage property ~~be~~  
 sold and the proceeds applied to the payment of the amou~~nt~~  
 due to your orator and on the said notes now sued ~~on~~  
 against your orator, and that a receiver be appointed ~~to~~  
 collect the rents, issues, crops and profits of said lands ~~so~~  
 bought as aforesaid by Early W. Thrasher, as trustee or ~~in~~  
 his own right, and by Barton H. Thrasher, as trustee, fro~~m~~~~

---

---

Hayden v. Thrasher et al.—Opinion of Court.

---

---

S. C. and G. W. Means, including the orange crop the five acres conveyed by said Barton H. Thrasher and Dickenson, and the proceeds applied as hereinbefore.

It follows the general prayer and prayer for process. Other facts of the case are sufficiently stated in the opinion.

D. McConnell and Hammond & Johnson for Appellant.

Hayden & Thrasher for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

This suit was commenced in Alachua county by appellant against B. H. Thrasher and others for the purpose of compelling them to protect him against certain notes which had indorsed at their request. The case was here on appeal at the January term, 1882, and some of the principal allegations of the bill are stated in 18 Fla., 795. B. H. and E. W. Thrasher have died since the commencement of the suit.

The cause now comes up on appeal from a decree dissolving the injunction which had been granted against B. H. Thrasher, Dickenson and Means, forbidding the transfer of property alleged to have been purchased with the proceeds of the notes. The injunction was dissolved by the answers of B. H. Thrasher, Dickenson and Knox, administrator of E. W. Thrasher.

B. H. Thrasher denies, *seriatim*, nearly every allegation of the bill. He denies that Hayden indorsed the notes at his request, and that he ever had any conversation with him on the subject; denies that he represented that the real estate in Alachua conveyed to secure Hayden was unincumbered, or that the parties were solvent, or that the indorsement was pro-

---

 Hayden v. Thrasher et al.—Opinion of Court.
 

---

cured for the purpose of raising funds for the purpose of going to Florida, or for the purpose of division among his father and brothers, and generally denies all fraud in the matter. He says that he borrowed two of the notes for \$4,500 or \$5,000, indorsed by Hayden from his father, E. W. Thrasher, and used them in paying G. W. Means for an undivided half of 110 acres of land, to wit: \$5,000, taking title to the land in the name of himself as trustee for his wife, and that he bought from S. C. Means the other undivided half of the land for \$5,000, paying therefor \$4,000 out of proceeds of property held by him in trust for his wife and \$1,000 out of the proceeds of a portion of the property purchased which he sold. What property he had held as trustee for his wife, or how he obtained it, is not stated. He says that his father received from Albert M. Thrasher two of the notes "in settlement of their business affairs." As to the lot on which his house was built he says that "as trustee he did have in possession and under his control ample means to purchase the Cannon lot referred to in complainant's bill and to build a residence thereon, and defendant alleges that said Cannon lot and the residence thereon were purchased and built *with the funds he held as trustee.*"

Right here we compare with this the statement of W. A. Dickenson, in his answer. He says: "In or about September, 1878, B. H. Thrasher, as trustee, procured this defendant to purchase the Cannon lot for him and in a short time thereafter, to wit: in November, 1878, engaged this defendant to advance money to build the house that is now being built upon the lot; the said B. H. Thrasher securing this defendant for the purchase of the lot and the furnishing the money for the building of the house, and all this was a finished bargain and contract long before the purchase of the Means land was mentioned," and the deed was taken in Dickenson's name "until he was made safe

---

---

Hayden v. Thrasher et al.—Opinion of Court.

---

---

the money to be advanced, and this defendant was made  
entirely safe long before the five acre trade was mentioned  
thought of.” This inconsistency is not explained.  
Thrasher also answers that he, as trustee, borrowed the  
notes from his father, as trustee, to pay to Means for  
land, and gave to his father as trustee a mortgage on  
land to secure the loan amounting to “\$4,500 or \$5,-

Dickenson says in his answer that he bought of B. H.  
Thrasher five acres of the 110 acres procured from Means,  
the same five acres on which Means had a residence,  
in an orange grove, to wit: on the third day of January,  
and at the same time a mortgage held by Thrasher,  
E. W., against Means, was transferred to Dickenson, and  
the consideration was \$6,500. This transaction oc-  
curred on the very next day after the dissolution of an in-  
junction obtained by one Freyer against B. H. Thrasher in  
which was brought by Freyer to secure one of the notes in-  
debted by Hayden, out of the same property. Dickenson  
says he knew nothing of that suit or injunction, but the  
fact remains that Thrasher knew of it and hastened to  
transfer the property to Dickenson the moment Freyer’s  
action was dissolved. Though Dickenson says the  
purchase by him of the five acres was made “in good faith  
and for a valuable consideration,” he omits to state that he  
gave the consideration or any part of it then or at any other

Dickenson also says the mortgage held by E. W. Thrasher,  
E. W., against B. H. Thrasher, trustee, covering this prop-  
erty to secure E. W. Thrasher, trustee, for the two notes  
“\$4,500 or \$5,000” borrowed of him by B. H. Thrasher,  
B. H., was transferred to him, Dickenson, by E. W.  
Thrasher “for a valuable consideration, and in the regular  
course of trade”; but Dickenson again omits to say what

---

---

Hayden v. Thrasher et al.—Opinion of Court.

---

---

the consideration was, or that he *paid* any consideration for this mortgage then or at any other time.

In a proceeding against Wm. M. Knox, as for a contempt of the injunction herein granted, Knox, who is no party to this suit, as administrator of E. W. Thrasher, deceased, states on oath that "he made a contract with Dickenson for the purchase of the five acres referred to in said petition, and although he paid the entire purchase price he only took from W. A. Dickenson a bond for title," and he "submits that in making said purchase he could in no manner be charged with any contempt of court, he was not a party *in person* to the bill of complaint and had no desire or intention of placing the property beyond the reach of the complainant, Hayden, should he finally succeed in his suit." How much Knox agreed to pay or how much he paid to Dickenson or to any other person for this orange grove and residence he does not state, and Dickenson omits to state anything about this sale of the property to Knox, who is a brother-in-law to B. H. Thrasher. From this statement, if it is true, it would have been appropriate, perhaps, to have inquired of Dickenson why he sold and gave possession of the property to Knox while he himself was aware of the injunction, it having been served on him very soon after the filing of this bill, expressly forbidding him to do so.

As to the denial of B. H. Thrasher that he obtained the indorsement of Hayden upon the six promissory notes, one for \$2,000 and five for \$2,500 each, amounting to \$14,500, and that these notes were distributed among his father, brothers and himself, he admits that he was present when the notes were indorsed, at Atlanta, Ga., in his office. That then and there his brother, A. M. Thrasher, and himself indorsed them and then complainant indorsed and left the notes with A. M. Thrasher. And he denies that the



---

---

**Hayden v. Thrasher et al.—Opinion of Court.**

---

---

s were so procured to be indorsed with the view of going to Florida and there using the proceeds obtained upon credit of the complainant's said indorsement. He deposes that he had any conversation with complainant at any time on the subject of the indorsement of the notes and that he was in any way concerned in the matter of the disposition or negotiation of the notes. Yet he says that at the time of the indorsement of the notes "he did honestly intend that said notes should be paid at maturity and that complainant should be held harmless in the premises."

He says further that he "borrowed" two of these notes from Early W. Thrasher, and that the latter had received them from his brother, A. M. Thrasher, "in settlement of business affairs, and the transfer was made for a then valuable and present consideration," the actual consideration not stated. He used these two notes in paying Geo. Means for his undivided half of the 110 acres of land. Means, in his answer, says the most of the \$5,000 consideration for this land was realized out of these two notes.

Upon the hearing of the motion to dissolve the injunction, certain affidavits were used by complainant in support of the allegations of his bill, and these affidavits were admitted by the Chancellor.

The affidavit of S. D. McConnell states that he met B. H. Thrasher in Atlanta, who had just returned from Florida, and that he asked him about the maturity of the notes, and Thrasher asked deponent to aid him in getting certain notes discounted, which were indorsed by complainant, and exhibited some of the notes described in the bill, and deponent knew of Thrasher's getting two of the notes discounted and soon afterwards returning to Florida. F. L. Freyer swears that in February, 1876, B. H. Thrasher gave him a note of \$100, signed by W. L. Thrasher and indorsed by B. H. Thrasher, A. M. Thrasher and J. A. Hayden, dated June 2, 1875,

---

---

Hayden v. Thrasher et al.—Opinion of Court.

---

---

due 18 months after date, in exchange for a note Freyer **he** against G. W. Means, which last mentioned note was **use** by B. H. Thrasher in paying for land he had bought of **S.** C. and Geo. W. Means; and deponent, after the \$2,000 **note** became due, sued Hayden and recovered judgment **thereon** for \$2,800, which Hayden paid. B. E. Anderson, B. H. Overby and E. Heyser swear that they had known Early **W.** Thrasher and Barton H. Thrasher where they had resided in Georgia, and that they were insolvent, and judgments obtained before their departure in 1875 and executions against them remain unsatisfied. E. Heyser, Clerk of **the** Superior Court of Morgan county, where Early **W.** Thrasher resided, certifies on oath that an examination **of** the records fails to show that the wife of E. W. Thrasher had any separate estate. Geo. H. Wagnow swears that **he** knew E. W. and B. H. Thrasher in Georgia; that E. **W.** Thrasher was supposed to be insolvent, and that he and **his** family "mysteriously disappeared from their home in **Geor-**gia in the night time in the fall or winter of 1875."

Thomas Lamins swears that he has known E. W. **and** B. H. Thrasher for some years, and that to the best of **his** knowledge and belief the wife of B. H. Thrasher, when **he** married her, had very little, if any, property, that she **was** poor and was educated mainly by Early W. Thrasher.

It appears that the Thrashers left Georgia and came **to** Florida soon after the making and indorsing of the notes **in** question. They bought valuable property which they **paid** for with money and with the notes, taking titles in **them-**selves as "trustees for their wives and children," and **tak-**ing and executing mortgages between themselves as **such** "trustees." The notes seem to have been distributed **be-**tween them and "borrowed" by one of the indorsers for **the** purpose of buying property with them. Dickenson **appears** to be the instrument of B. H. Thrasher in holding, buying

---

---

Hayden v. Thrasher et al.—Opinion of Court.

---

---

selling the property and securities acquired by B. H. Thrasher, trustee. Knox, the brother-in-law, (now the administrator of the estate of E. W. Thrasher) not being personally a party to the suit, steps in and buys some of the property held by Dickenson, and Dickenson, disregarding injunction, sells the property to Knox "in the regular course of business" or "trade" and is paid a "valuable consideration," but in all this apparent shuffling and dealing they are all careful to avoid stating frankly what was the consideration, and how and when it was paid.

The whole tenor of the answers of B. H. Thrasher, Dickenson and Knox go very far toward establishing the truth of the allegations of the bill, that the indorsements of the notes were procured by the Thrashers for the purpose of raising money for their own use with no intention of paying them on the part of the Thrashers, and that Dickenson is aiding them in obstructing complainant's efforts to recover the property. Possibly his conduct can be explained as the case stands it requires explanation which is not furnished by the answers.

The answer of B. H. Thrasher is a series of denials, and only denials of allegations in the bill, and nothing is explained. He does not deny the charge of insolvency of himself, or his father, nor show that his wife had any property or estate of any kind, on coming to Florida, or that he was any as her trustee, which was not the very proceeds of the notes. Her poverty is *prima facie* shown by the affidavits of people who had known the family long before they came to Florida.

Upon this state of the case the Chancellor dissolved the injunction. We have not sought to show from the record that now stands that the complainant is entitled to a decree against these parties or either of them, but to show that enough appears in behalf of the complainant and

---

 Hayden v. Thrasher et al.—Opinion of Court.
 

---

against the principal defendants, from the bill and affidavits and from the answers of the defendants, to forbid the dissolution of the injunction.

The court in *Carter vs. Bennett*, 6 Fla., 214, 236, remark that it is the general practice that if the answer denies fully *all the circumstances* upon which the equity is founded, credit is given to the answer and the injunction dissolved; but that it is not of course to dissolve the writ, and there are exceptions quite as important as the rule itself.

Chancellor Kent, in *Roberts vs. Anderson*, 2 John. Ch., 204, says: "The fraud as charged, is a proper and familiar head of equity jurisdiction, and unless the answer be full and satisfactory, the injunction, if right in the first instance, ought to be retained until the hearing. \* \* \* All the denial contained in the answer is that the defendants were not privy to any fraud, and were *bona fide* purchasers under a judgment and execution. \* \* \* This is leaving the question of fraud as unsettled as before the answer came in. \* \* \* The case does not fall within the reason of the general rule that an injunction is to be dissolved when an answer comes in and denies all the equity of the bill. The granting and continuing of the process must always rest in sound discretion, to be governed by the nature of the case."

Judicial discretion should be exercised in furtherance of justice. A dissolution of the injunction in this case puts it within the power of the defendants to deprive the complainants of all remedy, though it should appear when testimony is taken that by the fraud of some of the parties he loses a very large amount of money and the answer was a sham. It appears by the pleadings in this case that on the day after the dissolution of an injunction obtained by Freyer, in proceedings had for the purpose of securing

---

---

Hayden v. Thrasher et al.—Opinion of Court.

---

---

of these notes, the orange grove property passed into hands of Dickenson, who says he did not know when giving it of Thrasher that any litigation had existed regarding it. And it also appears by the answer of Knox, administrator and son-in-law of E. W. Thrasher, (who his life time had been served with the injunction,) that he had bought the same property from Dickenson and paid for it while Dickenson had been enjoined from doing the act. And Knox also says he was innocent and ignorant of the existence of the injunction which Dickenson violated. We submit that in view of the character of the bill in this case, and the admissions of the defendants Dickenson and B. H. Thrasher, and the response of Knox in the matter of the contempt, the answers do deny *all the equities* of the bill and that sound discretion requires that the injunction shall be continued until a hearing.

Respondents urge that the complainant had been guilty of laches in the prosecution of the suit. Since the commencement of this suit two of the principal defendants died; the cause has been once dismissed and reinstated on appeal of this court; the Judge of the Circuit died, his successor was disqualified to act; a change of venue became necessary and the cause was sent to another circuit, and on defendant's motion the injunction was dissolved, rendering another appeal necessary. Under the circumstances we do not think the question of laches should be suggested.

The decree dissolving the injunction must be reversed. As to the appointment of a receiver, the necessity of it should be left to the judgment of the Chancellor upon a further hearing.

---

Bradley v. The State of Florida—Opinion of Court.

---

FRANK BRADLEY, PLAINTIFF IN ERROR, VS. THE STATE OF  
FLORIDA, DEFENDANT IN ERROR.

1. An indictment under sub-chapter 4, Section 39 of Chapter 1632, Laws of 1868, charging that the defendant "feloniously did buy, receive and have, and did then and there aid in the concealment of certain stolen property of," &c., knowing the said property to have been feloniously stolen, &c., is good, the words "and have" being mere surplusage, and not liable to mislead the defendant.
2. When a statute makes either of two or more distinct acts, connected with the same general offence, and subject to the same punishment, indictable as distinct crimes, they may, when committed by the same person at the same time, be coupled in one count and constitute but one offence.
3. The indictment in such a case might be either for the buying or the receiving, or the aiding in the concealment of the stolen property; but where it combines all these offences in one count, it is but one offence, and the punishment is no greater than when but a single charge, as of buying, is made and established.

Writ of Error to the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

*T. A. McDonell* for Plaintiff in Error.

*The Attorney-General* for The State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court:

In the month of November, 1883, Frank Bradley, the plaintiff in error, was indicted in Duval county for buying and receiving stolen goods, &c. The indictment charges that Frank Bradley, on the 15th day of November, A. D. 1883, "five barrels of flour of the value of seven dollars each of the property, goods and chattels of the Florida Central and Western Railroad Company, a corporation in-

---

---

**Bradley v. The State of Florida—Opinion of Court.**

---

---

obtained and existing under the laws of the State of Florida before then feloniously stolen, taken and carried away, and did then and there feloniously buy, receive and have, and did then and there aid in the concealment of the same, the said Frank Bradley then and there well knowing the said property, goods and chattels to have been feloniously stolen, taken and carried away, contrary to the form of the statute, &c.” The cause was tried on a plea of not guilty on the 21st day of November, and defendant was found guilty. On the 22nd day the attorney for the defendant moved in arrest of judgment, on the grounds—first, “that the offence is charged in such a way that it leaves it uncertain what is intended to be charged. Second. That said indictment in single count charges more than one statutory offence and is bad for duplicity. Third. That the facts stated in the indictment are not sufficient to constitute the offence attempted to be charged.

The court overruled the motion, and the counsel for the defendant duly excepted, and brings his writ of error to this court, and assigns his errors as follows:

The plaintiff assigns for error, that the indictment, in single count, joins more than one felony; that the verdict is general; that the record shows that he has been convicted on one count of more than one offence by the same indictment; that no legal judgment can be entered thereon.”

The statute under which this indictment is found is chapter 1637, Laws 1868, sub-chapter 4, §39, and reads as follows: “Whoever buys, receives or aids in the concealment of stolen money, goods or property, knowing the same to have been stolen, shall be punished by imprisonment,” &c.

Mr. Bishop, in his work on Statutory Crimes, §244, says:

“As is common in legislation, a statute makes it punishable to do a particular thing specified, ‘or’ another thing, or another, one commits the offence, who does any one of

---

---

Bradley v. The State of Florida—Opinion of Court.

---

---

the things, or any two, or more, or all of them. And the indictment may charge him with any one, or with any larger number, at the election of the pleader; employing, if the allegation is of more than one, the conjunction 'and' where 'or' occurs in the statute."

The word "have" as used in the indictment, is not embodied in the statute, and may be treated as surplusage.

"Where a statute makes two or more distinct acts, connected with the same transaction, indictable, each one of which may be considered as representing a stage in the same offence, it has, in many cases, been ruled that they may be coupled in one count." 1 Wharton's Crim. L., §390.

In the case of *Byrne et al. vs. The State*, 12 Wis., 519, C. J. Dixon, speaking for the court, says: "The rule is well settled that where a statute makes either of two or more distinct acts, connected with the same general offence and subject to the same measure and kind of punishment, indictable separately and as distinct crimes, when each shall have been committed by different persons or at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting altogether but one offence. In such cases the several acts are considered as so many steps or stages in the same affair, and the offender may be indicted as for one combined act in violation of law; and proof of either of the acts mentioned in the statute and set forth in the indictment will sustain a conviction." See also *State vs. Bielby*, 21 Wis., 204.

In *State vs. Nelson*, 29 Maine, 329, the court say: "The statute, C. 156, §1, makes the buying, receiving or aiding in the concealment of stolen goods but one offence though it may be committed in three modes. If it is charged in all three of the modes still but one offence is committed, and only one punishment can be inflicted. The offence is ex-



---

**Bradley v. The State of Florida—Opinion of Court.**

---

shed by proof of either of the modes, but the penalty is the same for one as all three of them. There is, therefore, but one crime charged."

*Stevens vs. Commonwealth*, 6 Metcalf, 241, the indictment alleged the stealing of certain goods, and then charges that the defendant the goods so stolen did receive the same, and then and there did feloniously aid in concealing the same. The court said that there is but one count in which the defendant is charged, and there is but one offence with which he is charged; that it is made but one offence by the statute, although, according to the language of the statute, it may be committed in one of three modes; that is, stealing, receiving or aiding in the concealment of stolen goods. Whether charged to be done in one, two or all three of the modes mentioned, it is still but one offence, and the general finding of the jury is, that the offence was committed as charged. *Commonwealth vs. Nichols*, 92 Mass., 199; *Ib. vs. Eaton*, 15 Pick., 273; *Ib. vs. Hall*, 85 Mass., 305.

The indictment in this case is not bad for duplicity. It charges but one offence, although the offence might have been committed in one of three modes. The jury have found that the offence was committed as charged in the indictment. The penalty, as provided in the statute, is no different where the indictment charges the three distinct offences in one count than where but a single charge, as of "stealing" is made and established. The punishment is the same in both cases. The judgment is affirmed.

---

---

Blige v. The State of Florida.—Syllabus.

---

---

WILLIAM BLIGE, PLAINTIFF IN ERROR, VS. THE STATE ☐ OF  
FLORIDA, DEFENDANT IN ERROR.

1. An application for the continuance of a cause is addressed to the sound discretion of the court, and ordinarily such discretion will not be interfered with by the appellate court. But where the court can see that the rights of the party may have been jeopardized, and the rule in regard to the application has been fully complied with, and there has been no previous delay, and especially when the application is made on the very day of the finding of the indictment, this court will control such discretion.
2. On the trial of a prisoner for an assault with a deadly weapon with premeditated design to effect the death of the person assaulted, it is not sufficient for the court to charge the jury that "the assault must have been made with a dangerous or deadly weapon." The question of premeditation is also a fact for the jury to find, and they should be satisfied of such fact by the evidence, beyond a reasonable doubt.
3. To enable this court to determine that there was error in the refusal of the court below to charge the jury upon the law, with reference to proof made on the trial, upon which refusal so to charge the alleged errors are based, such evidence should be brought here in the bill of exceptions in order to inform this court as to the applicability of the request to the facts proved.
4. In no case, civil or criminal, will an appellate court indulge presumptions adverse to the correctness of the rulings of the court below. The presumptions which are indulged in are in support of the judgment of the court.
5. When either the State's Attorney or the attorney for a defendant, in cases provided for by Chapter 2096, Laws, desire the court to charge the jury in writing, a request to that effect must be made in writing before the evidence is closed. The party cannot subsequently except to the oral charge, unless he has complied with the law in that respect.
6. A weapon may be a deadly weapon, although not especially designed for offensive or defensive purposes, or for the destruction of life or the infliction of injury.

---

 Blige v. The State of Florida—Opinion of Court.
 

---

it of error to the Circuit Court for Hillsborough  
y.

facts of the case are stated in the opinion.

B. Wall for Plaintiff in Error.

orney-General for Defendant in Error.

JUSTICE VANVALKENBURGH delivered the opinion of  
ourt.

October, A. D. 1883, William Blige was indicted in  
orough county for an assault with intent to commit  
er. The indictment charges such assault to have  
made by Blige upon one Samuel Ingraham, with an  
weight, which he held in his hand, such weight being  
dly weapon. This indictment was filed on the 10th  
f October. On the same day the attorneys for the de-  
nt, Blige, caused a subpoena to be issued by the Clerk  
Circuit Court to Nixon Brown and Thomas White-  
commanding them to appear in Court on that day,  
tify in behalf of the defendant. This subpoena was  
the same day on both of the witnesses, as appears  
return of the sheriff thereon in the record. On the  
day the defendant moved for a continuance of the  
upon an affidavit made by him as follows:

*the Circuit Court, Sixth Circuit of Florida, in and for  
sborough county, Fall Term, A. D. 1883:*

STATE OF FLORIDA	}	Assault with intent to murder.
vs.		
WILLIAM BLIGE.		

, on this 10th day of October, A. D. 1883, comes  
fendant, William Blige, who being duly sworn, says  
Thomas Whitehead and Nixon Brown are material  
es for his defence; that he expects to prove by said

---

---

Blige v. The State of Florida—Opinion of Court.

---

---

witnesses that about fifteen or twenty minutes before the difficulty took place in which he is charged with assaulting the said Samuel J. Ingraham, that the said Ingraham assaulted the defendant on board the steamship Lizzie Henderson, on which defendant was employed, cursed and abused defendant, threatened his life, and attempted to throw defendant overboard, and was prevented from doing so by one of the witnesses, and that this was done without any sufficient provocation on part of the defendant; that as soon as the bill of indictment was returned against defendant, his counsel filed a præcipe for said witnesses and tendered the fees for issuing subpoenas; that said witnesses are both employed on board the said steamship Lizzie Henderson, which steamship had sailed before the finding of said bill of indictment; and affiant is informed and believes that said witnesses could not be gotten here during the present term of the court; that they are both residents of this county, and affiant expects to have them present at the next term of court; that they are not absent by his consent or procurement, directly or indirectly given; that he cannot safely go to trial without their testimony, or that of at least one of them; that he has no other witness by whom he can prove these facts, and that this application is not made for delay only; wherefore a continuance is prayed."

This affidavit was subscribed and sworn to before the clerk of the court on the 10th day of October, 1883. The cause was called on the same day, and the motion for continuance was denied. The counsel for defendant excepted to such denial. On the 13th day of October the defendant pleaded not guilty, was tried, found "guilty of an assault with intent to murder, as charged in the indictment."

The counsel for the defendant moved for a new trial for the following reasons:

---

---

**v. The State of Florida—Opinion of Court.**

---

---

the court erred in refusing the continuance defendant's counsel.

the court erred in refusing to charge the before they can convict the prisoner of the id in the indictment they must be satisfied ence, beyond a reasonable doubt, that the de- an assault on Samuel Ingraham with a deadly with a premeditated design to take the life of aham," as prayed by the defendant's counsel.

the court erred in refusing to charge the d by defendant's counsel, "that when A. as- id within fifteen minutes thereafter angry continued to pass at intervals between the assaults A., both assaults constitute a part of , and are to be taken as parts of one and the ion."

e the court erred in refusing to charge the l by defendant's counsel, "that a two pound such as was exhibited in court as the instru- ouch the alleged assault was committed, is not pon, within the meaning and intendment of nder which this indictment was found."

the court refused to charge the jury, "that al- ficer in command of a ship has a legal right any of the employees, he has no right to com- oyee to leave the vessel, or to use force to eject n without giving him an opportunity to get r other property which might be on the ves-

se the court erred in merely indorsing upon instructions prayed for by defendant's coun- " without declaring to the jury in writing his pon as presented, and pronouncing the same s given or refused.

---

**Blige v. The State of Florida—Opinion of Court.**

---

7th. Because the court erred in merely indorsing upon the 6th instruction prayed for by defendant's counsel "Given," without declaring to the jury in writing his ruling thereupon as presented, and pronouncing the same to the jury as given or refused.

8th. Because the court erred in refusing to charge "that a deadly weapon, within the meaning of the statute under which this indictment is brought, is such a weapon as is made and designated for offensive and defensive purposes, or for the destruction of life or the infliction of injury."

9th. Because the court erred in merely indorsing upon the foregoing instructions asked for "Refused," &c.

10th. Because the court erred in delivering a part of his charge to the jury in writing and part orally.

11th. Because the court erred in signing and sealing a part of his charge to the jury, and giving a part thereof without signing and sealing.

12th. Because the court erred in not signing and sealing his entire charge to the jury.

13th. Because the verdict is contrary to the law.

14th. Because the verdict is contrary to the evidence.

The court overruled the motion for new trial, and the defendant's counsel excepted. Judgment and sentence followed. From this judgment the defendant brings his case into this court by writ of error.

The errors assigned by the plaintiff in error are the same as assigned on the motion for new trial, except that another error is assigned in that the court overruled said motion.

As to the first error assigned in refusing the continuance of the cause as asked for by the defendant's counsel, the record shows a conflict in the evidence upon this point. The return of the sheriff on the subpoena issued to Brown and

---

**Blige v. The State of Florida—Opinion of Court.**

---

Whitehead, as witnesses for the defendant, shows that it was served on both of them on the tenth day of October, 1883. On the same day an affidavit is used, of the defendant, on a motion for a continuance, in which it is stated that the two persons named in the subpoena were employed on the steamship Lizzie Henderson, which had sailed from the port previous to the filing of the indictment. The indictment was found and filed on that same day. It nowhere appears to what port she had so sailed, or whether or not such port was outside of the county of Hillsborough, in which such court was being held. Under the circumstances of this case we must hold that the return of the sheriff is correct, and as all the facts as they appear in the record thus far transpired on the same day, to wit: the tenth day of October, that the vessel had sailed subsequent to the issuing of the subpoena, and its service by the sheriff, probably without the knowledge of the defendant or his counsel. The affidavit shows that both such witnesses so subpoenaed were employees on the steamer, and although there is no evidence beyond that fact in the record, the probabilities are that they went with her. The indictment charges that the assault was made on the fifth day of October and was filed the tenth, and all the proceedings previous to the trial were on the tenth, the trial and verdict being on the thirteenth of the same month.

The affidavit upon which the motion for a continuance was based comes up to the rule as laid down in Harrell vs. Durrance, 9 Fla., 490, and in Gladden vs. The State, 12 Fla., 562. The application is addressed to the sound discretion of the court, and ordinarily such discretion will not be interfered with by the appellate court. But when the court can see that the rights of the party may have been jeopardized, and the rule in regard to the application had been fully complied with and there has been no previous

---

---

Blige v. The State of Florida—Opinion of Court.

---

---

delay, and especially when the application is made on the very day of the finding of the indictment, this court will control such discretion. We think a continuance should have been granted. *McNealey and Roulhac vs. The State*, 17 Fla., 198; *Sanford vs. Cloud*, 17 Fla., 532, 452; *The State vs. Wood*, 68 Mo., 444; *The State vs. Hagan*, 22 Kan., 490.

The second error assigned that the court refused to charge the jury "that before they can convict the prisoner of the charge as laid in the indictment they must be satisfied from the evidence, beyond a reasonable doubt, that the defendant made an assault on Samuel Ingraham with a deadly weapon and with a premeditated design to take the life of the said Ingraham," is well assigned. This was refused for the reason, as appears by the record, "because the jury had already been instructed that the assault must have been made with a dangerous or deadly weapon." This was not sufficient in itself. The question of premeditation was a question of fact for the jury, and if any reasonable doubt existed in the minds of the jury as to the premeditated design to take life, the defendant was entitled to the benefit of such doubt. The province of a jury is to find the facts; among these facts so to be found was not only that the assault was made with a deadly weapon as charged in the indictment, but also that such assault was made with a premeditated design to effect death. *Ernest vs. The State*, 20 Fla., 383; *Savage and James vs. The State*, 18 Fla., 909.

There is none of the evidence taken upon the trial embodied in the bill of exceptions, and this court is not informed how the refusal of the court to charge as requested by the defendant's counsel, as is alleged in the third and fifth errors, could be so assigned as errors. We must take it for granted that there was no evidence in the case to warrant the court to charge upon those questions as requested.



---

---

Blige v. The State of Florida—Opinion of Court.

---

---

To enable this court to determine that there was error in such refusal, the evidence should have been brought here in the bill of exceptions, which was duly signed and sealed by the court, and upon which refusal so to charge the alleged errors are based. In no case, civil or criminal, will an appellate court indulge presumptions adverse to the correctness of the rulings of the court below. The presumptions which are indulged in are in support of the judgment of the court. *Bodie vs. State*, 52 Ala., 395.

The statute provides that "whoever assaults another with a deadly weapon with a premeditated design to effect the death of the person assaulted, shall be deemed guilty of an assault with intent to murder," &c. Under this law this indictment was found. *McC. Dig.*, 354, §29.

The fourth assigned error is that the court refused to charge the jury "that a two pound scale weight, such as was exhibited in court as the instrument with which the alleged assault was committed is not a deadly weapon within the meaning and intendment of the statute under which this indictment was found." There is no evidence before us as to what the weapon was with which the assault was committed, but the indictment charges it to have been with "a certain iron weight, said weight being then and there a deadly weapon," and the jury by their written verdict found the prisoner "guilty of an assault with intent to murder as charged in the indictment." If the evidence had shown that the iron weight was a two pound scale weight, perhaps the request should have been granted, but there is before us no evidence of that fact, and we cannot know of the size or weight of the iron with which the assault was made. It is alleged to have been a deadly weapon and the jury have, by their verdict, determined that it was such a weapon. If the indictment was incorrect in charging the assault to have been made with a

---

---

Blige v. The State of Florida—Opinion of Court.

---

---

deadly weapon, the defendant could have taken advantage of it before trial, by moving to quash, or even after verdict, by his motion in arrest of judgment, but this court cannot here, without the evidence before it, say that the court should have charged as the counsel requested.

The sixth, seventh, ninth, tenth, eleventh and twelfth alleged errors will be considered together. The law, chap. 2096, 1877, provides that in all felonies not punished capitally the judge may charge the jury orally, unless they are requested by the State Attorney, or attorneys for the defendant, to charge the jury in writing, which request shall be in writing before the evidence in the case is closed. There is no such request on the part of either the State Attorney, or the attorney for the defendant in the record; on the contrary, the Judge certifies that "the court gave no charge in writing in this cause except the instructions asked by the State, and the defendant. The defendant did not ask the court to reduce the charge to writing." They submitted to the oral charge of the Judge to the jury given in accordance with the law. The instructions prayed for seem to have been in writing, and the Judge under his hand and seal, in the bill of exceptions, certifies that they were given or refused. He also certifies as above, that *except* the written instructions asked for, his charge was given orally, thus, in effect, saying that he did give or refuse the instructions asked for in writing. There is no evidence in the record that they were not given or refused in exact compliance with the law, but on the contrary, they were signed and sealed by the Judge and made a part of it. *Sherman vs. State*, 17 Fla., 888; *Southern Ex. Co. vs. Van Meter*, 17 Fla., 783; *Stewart vs. Mills*, 18 Fla., 57.

The eighth error assigned is in the court's refusing to charge "that a deadly weapon, within the meaning of the statute under which this indictment is brought, is such a

---

---

Blige v. The State of Florida—Opinion of Court.

---

---

weapon as is made and designated for offensive and defensive purposes, or for the destruction of life or the infliction of injury.”

The counsel for the defendant, in his argument, says: Deadly weapons within the meaning and contemplation of the law are such only as *ex vi termini* import their adaptability to the destruction of life, or the infliction of bodily injury, and not such instruments as might be utilized for such purpose. Mr. Bishop, in his “Statutory Crimes,” says: “The term ‘deadly weapon’ occurs in the common law of homicide and in various statutes. It is a weapon likely to produce death or great bodily injury. In a case of doubt, the manner in which it was used may be taken into the account in determining whether or not it was deadly. And when the facts are all established, the question whether a particular weapon was deadly or not is one of law for the court; yet practically, as in most instances, the establishment of the fact awaits the rendition of the verdict, the jury must pass upon this question under instructions from the court.” The court did not err in refusing to charge as requested by the defendant’s counsel. A weapon may be deadly although not especially “designated for offensive and defensive purposes, or the destruction of life, or the infliction of injury.” In the case of the State of Minnesota vs. Dineen, 10 Minn., 407, where the defendant was indicted for an assault with intent to do great bodily harm, being armed with a *dangerous* weapon, the court say: “A dangerous weapon is one likely to produce death or great bodily harm. A stone may, or may not be a dangerous weapon, depending upon its size and other circumstances. A large heavy stone in the hands of a man intending to do great bodily harm is likely to produce that result, and cites 1 Rus. on Cr., 473, 5 Am. Ed. The court might have said with equal truth that such a weapon was

---

 Blige v. The State of Florida—Opinion of Court.
 

---

a deadly weapon when used as is charged in this indictment with a premeditated design to effect death. This indictment charges that the assault was made with an "iron weight, being then and there a deadly weapon." There is none of the evidence embodied in the record, and it is impossible for us to tell the length, breadth or diameter of such iron weight. The jury, however, having such evidence before them under the instructions of the court, (none of which are here only as excepted to,) have found that such iron weight was a deadly weapon.

In the case of Shadle vs. The State, 34 Texas, 572, the court say: "When a gun or pistol is used simply as an instrument to strike with, it is not necessarily a deadly weapon, but would be such or not according to its size and the manner of using it; and these facts should be determined by a jury." In Skidman vs. The State, 43 Texas, 93, the same court uses the following language: "Whether a pistol is a deadly weapon, when used to strike with as a club or stick, must depend upon its size or weight in connection with the manner of its use and the part of the person that is stricken with it. A deadly weapon is defined to be 'one likely to produce death or great bodily injury.' A pistol used to strike with is nothing more than a piece of iron of the same size, weight and shape. There may be five or six shooting pistols so small that they would not, when so used, be likely to produce death or serious bodily injury." See also Chambers vs. The State, 42 Texas, 254.

In the case of Kruger vs. The State, 1 Neb., 365, cited by defendant's counsel, the court in the opinion says: The indictment fails to charge that the weapons with which the defendants made the assault were deadly weapons, or that the names given to them import that they were such. They were described as being "weapons, to wit: wooden clubs." They say that to warrant a conviction under the

---

---

Blige v. The State of Florida—Opinion of Court.

---

---

section of the criminal code of that State under which the indictment was found, it is necessary that the assault be made with a deadly weapon, or with "some other instrument or thing fitted to occasion death, in the use to which it is put. If it be a weapon, the ordinary name of which, *ex vi termini*, imports its deadly character, *e. g.*, a sword, gun or pistol, it would be sufficient to describe it by such name; but in other cases the instrument or thing used should be described and charged to be deadly."

In *State of Nevada vs. Nappe*, 6 Nev., 113, the indictment was for an assault with a deadly weapon, with intent to commit murder. The court say: "To constitute, then, the crime of which defendant was convicted, he must have made an unlawful attempt with a weapon deadly, either in its nature, or *capable of being used in a deadly manner*, intending to inflict a bodily injury and with the present ability so to do."

In the case of *Hunt vs. The State*, 6 Texas Court of Ap., 663, the court say: "As to whether or not the weapon is, in fact, a deadly weapon, is matter of proof, and depends in some cases upon the mode and manner of its use."

In *Kouns vs. The State*, 3 Texas Ct. A., 13, it is said: "A chair is not necessarily a deadly weapon; whether it is such must depend upon its size or weight, in connection with the manner of its use and the part of the person that is stricken with it."

It will be seen from the cited cases that a gun or pistol made for both offensive and defensive purposes, are not, under certain circumstances, and without due proof, considered by the courts as deadly weapons; while a stone, axe or chair may be considered dangerous or deadly weapons, depending entirely upon the proof of the mode and manner of their use. We believe the true rule is that laid down in the case of *The United States vs. Small*, 2 Curt., C. C.,

---

---

Carter v. The State of Florida—Syllabus.

---

---

241, inserting the words "deadly weapon," when the word "dangerous weapon is used." It is there said: "In many cases it is practicable for the court to declare that a particular weapon was or was not a dangerous weapon within the meaning of the law. And when it is practicable it is a matter of law, and the court must take the responsibility of so declaring. But when the question is, whether an assault with a dangerous weapon has been proved, and the weapon might be dangerous to life or not, according to the manner in which it was used, or according to the part of the body attempted to be struck, I think a more general direction must be given to the jury; and it must be left for them to decide whether the assault, if committed, was with a dangerous weapon." Such is the rule adopted in the case of the State of Nevada vs. Rigg, 10 Nevada, 284.

The judgment must be reversed for the reasons above assigned, and a new trial awarded.

---

SILAS B. CARTER, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. The rule is well settled that an exception to the charge of the court to the jury must be taken to the identical portion or paragraph of such charge as is alleged to be error; and that an exception to the entire charge is not sufficient if a single proposition therein is good. 17 Fla., 643, and cases cited.
2. Under chapter 3431, Laws 1883, the party may, after verdict rendered, "embody in a motion for a new trial any portion of the charge of the Judge which may be deemed erroneous," but he must embody in such motion only such portion of the charge as is alleged to be erroneous. That statute does not change the rule. It only gives to the party an opportunity to except after verdict rendered.

---

---

Carter v. The State of Florida—Opinion of Court.

---

---

3. All the evidence used in the proceedings in the court below, and upon the motions subsequent to the verdict, should be embodied in and made a part of a bill of exceptions in order to enable this court to review them.

Writ of error to the Circuit Court for Orange county.

Chapter 3431, Laws of Florida, is as follows:

SECTION 1. That in all civil cases in the Circuit Courts of this State, either party, plaintiff or defendant, may at any time after the jury retires, and before verdict rendered, except to any portion of the charge delivered by the Judge, and the said Judge before whom such cause is being tried may, if he deem such exception well taken, recall the jury and make any alteration or addition of or to such charge as may be deemed necessary and proper.

SEC. 2. It shall be lawful for either party in any civil cause, or for the defendant in any criminal cause, in said courts, after verdict rendered, to embody in a motion for a new trial any portion of the charge of the Judge which may be deemed erroneous, which shall be taken as an exception to said charge, and if such motion for a new trial, upon the hearing, shall be refused, such refusal, together with the subject-matter of the charge contained in such motion, may be made the subject of review by the Supreme Court.

The other facts are stated in the opinion.

*W. R. Anno and John W. Price* for Plaintiff in Error.

*The Attorney-General* for Defendant in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the Court.

In the month of August, 1882, Silas B. Carter was indicted for the murder, in the county of Orange, of one

---

---

Carter v. The State of Florida—Opinion of Court.

---

---

John W. Griffin. In May, 1883, the defendant having plead not guilty, was tried and found guilty of murder in the first degree. A motion for a new trial was made by defendant's attorneys, who assigned the following reasons:

1st. That the verdict was contrary to the evidence.

2d. That the verdict was contrary to the charge of the court.

3d. That the jury erred in their conclusion drawn from the evidence.

4th. That the evidence is not sufficient to authorize the verdict rendered.

5th. That the jury was misled by the charge of the court.

6th. That the court erred in the charge to the jury.

7th. That the court erred in giving special instructions prepared by the State's Attorney.

8th. That one of the Jurors, viz: one J. M. Moorman, was not a legal juror. He said this on the *voir dire*, that he had neither formed nor expressed an opinion as to the guilt or innocence of the accused, and he said, after having been sworn, that he was not a competent juror, and that the attorneys did not understand him; that previous to his being called to serve as a juror he said publicly in consultation with Andrew Wise and others, in speaking of the mistrial of the jurors at the first hearing of the said cause, that Silas B. Carter ought to have been hung, and that if he had been on the jury he would have hung him, and for other causes and reasons apparent on the face of the record.

9th. For discovery of new evidence which was not known to the defendant or his counsel previous to the trial, which evidence is material to the defendant in his defence.

10th. Also upon the ground of the misconduct of one of



---

---

**Carter v. The State of Florida—Opinion of Court.**

---

---

errors during the trial of the cause as shown by affida-

e motion for a new trial was then overruled by the and the defendant's counsel excepted to such judgment of the court. Afterwards, on the 11th day of July, the court pronounced the sentence according to law. The court then allowed a writ of error to this court, also ninety days in which to propose their bill of exceptions. Subsequently, on motion of plaintiff in error, the time for filing a bill of exceptions was extended to the tenth day of November, 1883.

The errors assigned are as follows:

First. The court erred in and by the special instruction requested by the State's Attorney."

Second. That the court erred in and by refusing to grant the motion for, and give a new trial to the said Si-Carter."

Third. That the court erred in many other rulings and decisions as shown and appears from the records of said trial and conviction."

This defendant was sentenced to death on the eleventh day of July, 1883, and notwithstanding the time to propose a bill of exceptions was extended to the tenth day of November of that year, no bill of exceptions embodying testimony or any of it is in the record, and this court is unable to tell what evidence was before the jury; consequently the first, second, third, fourth and fifth grounds before the court on the motion for a new trial cannot be considered. We cannot tell how applicable the evidence was to the evidence adduced on the trial. The preparations are all in favor of the court below.

The sixth ground urged for a new trial that the court in its charge to the jury cannot be sustained. The evidence as appears in the record is full in every particular,

---

---

Carter v. The State of Florida—Opinion of Court.

---

---

embodying some eight or more propositions, most of them in accordance with the statute, and could not have misled the jury. The statute is cited, and the very language of the law is used in defining murder in the first, second, third and fourth degree, which we must presume applied to the evidence. Aside from the fact as above stated that many of the propositions of law as charged were correct, no exception was taken by the counsel for the defendant to any one single proposition so charged, nor even to the entire charge. The rule, however, is that the exception must be taken to the identical portion of the charge which is assigned as error, and that an exception to the entire charge is not sufficient if a single proposition therein is good. *Burroughs vs. State*, 17 Fla., 643, and cases cited.

The seventh ground for new trial, viz: That the court erred in giving the special instructions which were proposed by the State's Attorney, cannot be sustained. Those special instructions thus asked for and granted, were as follows:

"First. That the verdict must be made up from the evidence as given by the witnesses, and from the law as given by the court, and not from any statement of counsel."

"Second. That an assault and battery on another does not warrant the jury to infer that the party assaulted was in danger of his life, unless it be shown from the evidence that the party assaulted was in such danger, and that he believed that he was in such danger, and that this must appear from the evidence."

"Third. That if the defendant had been assaulted by the deceased in the heat of blood, he, defendant, would have been guilty of manslaughter. But that if the jury believed from the testimony, that the parties separated after the assault, and that forty-eight or fifty hours after, the

---

---

Carter v. The State of Florida—Opinion of Court.

---

---

defendant took a weapon, sought out the deceased and killed him, this is murder.”

“Fourth. That if the jury believe from the testimony that forty-eight or fifty hours elapsed between the assault and the killing, that this was time enough for the blood to cool, and if accused then killed defendant, he was guilty of murder, but that the jury must determine if such time did elapse between the assault and the killing.”

“Fifth. That for the jury to believe that the accused acted in self-defence, the fact must appear from the testimony and be properly deducible from the evidence as given by the witnesses. That to constitute self-defence, the fatal blow must have been struck while the deceased was menacing the life or person of the accused.”

“Sixth. That when it is in the power of a defendant to account for his conduct or to show his whereabouts at a particular time, his failure to do so is strong presumption against him.”

The record says: “Counsel for the defendant excepted to the above special instructions.” Which note was signed and sealed by the Circuit Judge.

There is no exception taken to either one of the six above named special instructions, but a single exception to the whole. This, we have frequently had occasion to say, is not sufficient. The counsel excepting must put his finger upon the paragraph he considers error, and to that take his exception. Taking it to the whole charge as given by the Judge, is fatal if either one of the propositions therein contained is in accordance with the law. He cannot sit quietly through the charge to the jury, and then, at its conclusion, say: “I except to the charge of the court.” The error must be pointed out. The Judge must then and there be advised of what is excepted to, and what is alleged to be error, in order, if possible, that such error may then and there be

---

Carter v. The State of Florida—Opinion of Court.

---

corrected. In the special instructions asked for by the State's Attorney, and given by the court, certainly some of them are clearly right, and were properly given. As to the others, we do not now express an opinion, as the evidence and facts of the case are not before us, and as no exceptions were taken to them particularly we are not called upon to decide them. In the motion for new trial the defendant's counsel has not, under the provisions of chapter 3431, Laws of 1883, pointed out or embodied "any portion of the charge of the Judge which may be deemed erroneous," but has simply excepted to the "special instructions proposed by the State's Attorney."

The eighth and tenth assigned errors relate to the jurors who tried the cause. It is said Moorman was not a legal juror for the reasons assigned in the eighth reason urged on the motion for a new trial. Upon this question several affidavits were introduced and passed upon by the court. One Andrew Wise deposed that "he heard Jordan M. Moorman, one of the jurors chosen upon the second trial of said cause, in conversation, speaking of the verdict of the first jury, say that Silas D. Carter ought to have been hung, and that if he had been on the jury he (Moorman) would have hanged him himself." Silas B. Carter, the defendant, swears "that he did not know at the time that J. M. Moorman and R. R. Sessions were accepted as jurors in the case State vs. Carter; that they had at any time previous thereto said that if they were on the jury they would hang Carter, or the words said to have been used by them in affidavit of Andrew Wise and C. E. Swan, or that they had any opinion in regard to said cause, or had expressed the same in any manner whatever." The four attorneys defending Silas B. Carter swear that they did not know at the time that J. M. Moorman and R. R. Sessions were accepted as jurors, that they had at any time previous thereto said that

---

---

Carter v. The State of Florida—Opinion of Court.

---

---

if they were on the jury they would hang Carter, or the words said to be used by them in the affidavits of Wise and Swan, or that they had any opinion in regard to said cause, or had expressed the same in any manner whatever.

In answer to these affidavits, J. M. Moorman, the juror, testifies: "That he may have expressed such opinion," (as contained in the affidavit of Wise, the affidavit of Swan not relating to him, but to R. R. Sessions,) "but that if he did it was based upon hearing about the case, and not from hearing any of the testimony or conversing with any of the witnesses in regard to it." "He further says that when examined on his *voir dire* he stated that he had formed and expressed an opinion in regard to the guilt or innocence of the prisoner, Silas B. Carter, but also states that that opinion was formed from rumor." "That after he had been tendered by the State and accepted by the defence and sworn in chief, he arose in open court to explain his position, and upon hearing that explanation both counsel for the State and the defendant stated that they understood him and accepted him. That when he went upon the jury he felt that he could give to the prisoner a fair and impartial trial according to the evidence. That his verdict was made up solely from the testimony disclosed upon the stand and not from any opinion previously made, formed or expressed by him. That he had no bias or prejudice for or against the prisoner, neither has he now."

Similar affidavits were filed in the case of the other juror, R. R. Sessions, to whom the affidavit of Swan referred.

The record in this case shows that the entire list of jurors selected by the Board of County Commissioners for that year was exhausted in procuring this jury, and that the court directed the sheriff to summon from the county at large and the bystanders thirty-five more persons to

---

---

Carter v. The State of Florida—Opinion of Court.

---

---

serve as jurors, making in all three hundred and thirty-five. That from this number the jury was taken, and that all who were accepted were sworn and examined as to their fitness to act as jurors, and were accepted by the defendant before being sworn in chief as such jurors. The court below passed upon the fitness of the jury, and passed upon the question raised by the affidavits on file on this motion for new trial. From personal observation he knew the facts as they existed at the time and he has passed upon the question raised. The jurors, from the facts, as shown in their affidavits, were competent and the presumption is strongly in favor of the ruling of the court below.

As to the ninth assigned error, there is no evidence anywhere of the discovery of new evidence or of any application for its admittance.

The judgment of the court below is affirmed.











+









**CASES ARGUED AND ADJUDGED**

**IN THE**

**SUPREME COURT**

**OF FLORIDA**

**DURING THE YEARS 1883-4.**

---

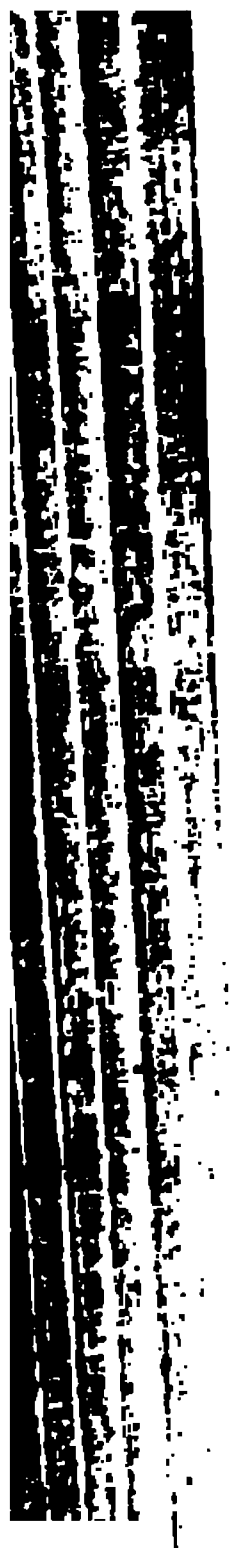
**REPORTED BY**  
**GEORGE P. RANEY,**  
**ATTORNEY-GENERAL.**

---

**VOLUME XX—PART II**

---

**TALLAHASSEE, FLA.:**  
**PRINTED AT THE FLORIDIAN BOOK AND JOB OFFICE.**  
**1885.**





## TABLE OF CASES.

---

	PAGE.
r, Marks v., .....	920
el, New Orleans I. Association v., .....	815
rell v. State, .....	869
len, Deans, v., .....	905
h & Son, Eckman & Vetsburg v., .....	763
z v. Rugg, .....	861
z and Alsop, Crolly v., .....	849
missioners of Sumter County, State <i>ex rel.</i> v., .....	859
v. State, .....	802
v. State, .....	839
y v. Clark & Alsop, .....	849
dson v. State <i>ex rel.</i> , .....	784
is v. Bowen, .....	905
son v. State, .....	800
<i>et als.</i> , Walker <i>et als.</i> v., .....	908
is v. Holmes, .....	834
nan & Vetsburg v. Brash & Son, .....	763
tt, Joost v., .....	924
arte Powell, .....	806
arte Thompson, .....	887
ida Savings Bank, Walter v., .....	826
nett <i>et ux.</i> v. Jacksonville, S. A. & R. R. D., .....	889
ding, Mull & Co., Reed v., .....	773
eley v. Jeffreys & Stribling, .....	819
eley and Blaisdell, Lara, Ross & Co. v., .....	926

	PAGE.
Hammond, Wharton v., .....	934
Harwood <i>et ux.</i> v. Root <i>et ux.</i> , .....	941
Holmes, Dubois v., .....	834
Jacksonville S. A. & H. R. R. Co., Garnett <i>et ux.</i> v., .....	889
Jefferson County v. Lewis & Sons, .....	980
Jeffreys & Stribling v. Greeley, .....	819
Joost v. Elliott, .....	924
Lara, Ross & Co. v. Greeley and Blaisdell, .....	926
Lewis & Sons, Jefferson County v., .....	980
Lindsay <i>et al.</i> , Matthews <i>et al.</i> v., .....	962
Marks v. Baker, .....	920
Matheson <i>et al.</i> v. Thompson, .....	790
Matthews <i>et al.</i> v. Lindsay <i>et als.</i> , .....	962
McClerkin v. State, .....	879
National Bank, Wittich, v., .....	843
New Orleans I. Association v. Boniel, .....	815
O'Neil v. Percival <i>et ux.</i> , .....	937
Pells v. State, .....	774
Pendry v. Wright <i>et als.</i> , .....	828
Percival <i>et ux.</i> , O'Neil v., .....	937
Powell, <i>ex parte</i> , .....	806
Read v. Gooding, Mull & Co., .....	773
Robinson v. State, .....	804
Root <i>et ux.</i> , Harwood <i>et ux.</i> v., .....	941
Rugg, Clark v., .....	861
Small v. State, .....	780
Smith v. State, .....	839
State, Boswell v., .....	869
State, Cook v., .....	802
State, Cox v., .....	839
State, Dickson v., .....	800
State, McClerkin v., .....	879

# TABLE OF CASES.

VII

PAGE.

Small v., .....	780
Pells v., .....	774
Robinson v., .....	802
Smith v., .....	839
Whitehead, v., .....	841
Villiams v., .....	777
<i>rel.</i> v. Commissioners of Sumter County, .....	859
<i>rel.</i> , Davidson v., .....	784
v. Wall, .....	924
on, <i>ex parte</i> , .....	887
on, Matheson <i>et al.</i> v., .....	790
ischler v., .....	924
v. Florida Savings Bank, .....	826
<i>et als.</i> v. Drew <i>et als.</i> , .....	908
v. Hammond, .....	934
ad v. State, .....	841
s v. State, .....	777
v. National Bank, .....	843
<i>et al.</i> , Pendry v., .....	828



# Decisions

## OF THE

# Supreme Court of Florida,

---

JUNE TERM, A. D. 1884.

---

CKMAN & VETSBURG, APPELLANTS, vs. S. BRASH & SON,  
APPELLEES.

In a suit by appellants against respondents to recover upon their alleged special promise to pay a debt due appellants from H. B., the following paper was offered in evidence by plaintiffs: "Received of Mr. D. for E. & V. forty-nine 65-100 dollars as commission for guaranty of H. B.'s account, which has been settled by him in full with note. [Signed] S. B. & Son." *Held*, That this is not a guaranty or a promise to pay the account of H. B., nor to pay notes given by H. B.

Such receipt is evidence of the payment and satisfaction of commissions upon a prior contract of guaranty of the payment of an account which has been settled by note, which contract of guaranty is not contained in the receipt, but is evidently independent of it.

Nor is this receipt evidence of money paid by plaintiffs for and at the request of defendants, nor of money due on account stated, under the common counts.

Every agreement which is required to be in writing, under the statute of frauds, must be certain in itself, or capable of being made so by a reference to something else whereby the terms can be ascertained with reasonable certainty, without reference to parol proof. The entire agreement must be in writing and signed by the party to be charged.

---

**'NOTE.**—As all of the cases submitted at the above term have not been filed at the commencement of this publication, I publish the opinions in the order in which they are filed.—REPORTER.

---

---

Eckman & Vetsburg v. Brash & Son—Statement of Case.

---

---

Appeal from Circuit Court for Jackson county.

This was an action against S. Brash and Henry Brash to recover upon their alleged written promise to pay a debt due Eckman & Vetsburg from another, H. Brash. The declaration alleges that H. Brash, of Apalachicola, on or about the first day of September, 1881, was indebted to plaintiffs for goods sold, and that on the sixth day of March, 1882, gave them two promissory notes representing the amount of such indebtedness, one of said notes for \$493.72, payable June 1, 1882, at either bank in Savannah, and the other note for \$499.35, payable August 1, 1882, at either bank in Savannah. That afterward, on the 11th day of March, 1882, at Marianna, the defendants, S. Brash & Son, in writing, for a valid consideration, guaranteed the payment of the amount due plaintiffs from said H. Brash for said goods, as expressed in said two promissory notes and according to the terms thereof, whereby the defendants promised in writing to pay the said sums upon default of said Henry Brash. That Henry Brash made default and neglected to pay the amount of the notes and failed to pay for said goods; and the defendants having had due notice thereof have refused to pay the sums of money aforesaid.

This is the case stated in the first three counts. There are additional counts for goods sold by plaintiffs to defendants; for money paid by plaintiffs for defendants at their request, and for money due upon account stated.

Annexed to the declaration is a "copy of cause of action," consisting of copies of the two notes of H. Brash to plaintiffs, and another paper of which the following is a copy: "Marianna, Fla., March 11, 1882. Received of Mr. Deitsch for Eckman & V. forty-nine 65-100 dollars as commission for guarantee of H. Brash's (Apala.) account, which has been settled by him in full with note.

"\$49.65.

S. BRASH & SON."

---

**Eckman & Vetsburg v. Brash & Son—Statement of Case.**

---

The defendants pleaded, denying that they had guaranteed or promised to pay the indebtedness of H. Brash as alleged, and also pleaded special matters of defence. To these pleas plaintiff filed general and special replications.

At the trial plaintiffs offered the notes and the receipt, claiming the same to be a written guaranty or promise by defendants to pay the debt of H. Brash, which papers were received subject to defendants' objections. Plaintiffs also offered certain letters of defendants and the deposition of Vetsburg, one of the plaintiffs.

These letters accuse Deitsch of having procured the so-called "guaranty" by cunning and trickery; express fears that it might be regarded as creating a liability to pay H. Brash's debt; denying that such result was intended by defendants; insisting that it was not a guaranty or promise creating any legal liability; that the \$49.65 was paid on account of the verbal guarantee and accepted with the distinct understanding that the account verbally guaranteed had been closed by bank acceptances; that no written guaranty was requested; that the \$49.65 was not asked for but was voluntarily tendered, and offering to return the money.

The deposition of Vetsburg showed that Deitsch was the agent of plaintiffs, and that his acts in the matter were authorized, and approved by them. He also testified to a conversation in regard to a compromise between him and one of the defendants, which resulted in nothing.

Plaintiffs also offered to show by the testimony of Maurice Deitsch the facts and circumstances attending the making of the contract and agreement sued upon. This was objected to by defendants on the ground that the contract could not be proved by parol evidence. The court sustained the objection, and ruled further that the testimony and written evidence offered on the part of plaintiffs did

---

---

Eckman & Vetsburg v. Brash & Son—Argument of Counsel.

---

---

not prove a written promise to pay the plaintiffs, and excluded the testimony. The Judge then charged the jury that there being no evidence to sustain the claim of the plaintiffs the defendants were entitled to a verdict. Whereupon the jury found for the defendants, and after a motion for a new trial was denied, judgment was duly entered for defendants. Plaintiffs appealed.

The several rulings of the court in excluding the testimony offered are assigned as error.

*S. Pasco* for Appellants.

The first question that arises is whether the contract upon which this suit is founded is within the statute of frauds. If we accept the reasoning of a large class of respectable authorities it clearly is not. There was a new and additional consideration between plaintiffs and defendants, and an independent contract resting upon it entirely outside of the contract of Henry Brash. It was that they for a money consideration would make his notes good. The continuance of the original contract and the liability of the promisor thereunder does not affect the obligation and liability of these new contractors, although of course the settlement of either contract would discharge plaintiffs' right of action against the other contractors. 3 Kent's Com., 123; Leonard vs. Vredenburg, 8 John, 28; Forth vs. Stanton, 1 Saunders, 211, note 2; Smith's Mercantile Law, 567; 1 Smith's L. C. Notes to Birkmyr vs. Darnell, 219; 2 Parsons on Notes and Bills, 132; *contra* Brandt on Suretyship, §§55, 57.

But if the court holds that this contract is within the statute of frauds, then the main point is as to the sufficiency of the memorandum, either alone or taken with the other writings and evidence offered in support of it, and we propose first to inquire what the memorandum must contain to satisfy the statute of frauds.



---

---

**Eckman & Vetsburg v. Brash & Son—Argument of Counsel.**

---

---

The memorandum must show who are parties to the contract. Thomp. Dig., 217, chaps. 3, 1 Brown on Frauds, §372.

This is signed by defendants. It guarantees the account of S. Brash, of Apa., settled by note. The contract is made through their agent, Maurice Deitsch, with Eckman & V. The only question upon the point that can arise is, whether Eckman & V., means Eckman & Vetsburg. This requirement is complied with if it appears with a reasonable certainty who the other contracting party is. Brown on Frauds, §373.

In a case decided in the United States Supreme Court the signature to the memorandum was by initials and it was regarded as sufficient. Salmon Falls Manufacturing Co. vs. Goddard, 14 Howard, 446.

There can be no doubt in this case as to who are meant by Eckman & V. The agent was named and he was in court ready to testify. Mr. Vetsburg's depositions were taken by commissioners and were offered and rejected, and they show conclusively that defendants knew to whom Eckman & V., referred. The letters offered in evidence and rejected, prove it beyond doubt. Walsh vs. Barton, 4 Ohio St., 28.

There must be a consideration, though in this State the memorandum need not show it. This clearly appears in the present case. Brown on Frauds, §376.

The memorandum must contain the express stipulations of the contract.

Is it not clear here what the defendants agreed to do. The meaning of guaranty is well settled in law, and defendants received plaintiff's money for the guaranty of their insman's account after it had been settled by note. Read their letters and it will be seen that they understood what their obligation was and their effort was to withdraw

---

---

Eckman & Vetsburg v. Brash & Son—Argument of Counsel.

---

---

from the bargain when they began to feel it was onerous. If there is any doubt upon this point it can be readily solved. It refers to the account of H. Brash, of Apa., settled by him in full with note. Plaintiffs were ready to prove that Apa. meant Apalachicola, and to identify the note and account of H. Brash. Baylies on Sureties, §19.

It is not necessary that the entire contract should be in one paper. Story on Sales, §272; Ide vs. Stanton, 15th Vt., 690; Fry on Specific Perf., §§209, 361; Benjamin on Sales, §252 and note; Story on Prom. Notes, Secs. 464 and 465; Thayer vs. Luce, 22 Ohio State, 74.

We claim that we were entitled to introduce parol testimony to identify these papers referred to in the memorandum and if they are connected the extent of defendants liability is not a matter of doubt. It has been held that the designation of a debt for which a third person makes himself responsible as the debt then owing, or the debt to become owing, is sufficient. Brandt on Suretyship, §72; Brown on Frauds, §385; Lee vs. Mahoney, 9 Iowa, 344.

But if the contract is within the Statute of Frauds and the court decides that it is not sufficiently set forth in the memorandum, we are still entitled to recover our consideration under the common counts in the declaration.

1st. The defendants have received our money and admit it by their pleas. They allege a tender back, but issue is made with them on this point and the memorandum should have been admitted as evidence on these counts if for no further purpose.

2d. The testimony of Vetsburg and Deitsch would have shown the surrounding circumstances, explained the parts of the memorandum subject to oral explanation, proved the payment of money under the common counts, and established the facts as to the alleged tender, and it is urged that they should have been allowed to testify.

---

*Eckman & Vetsburg v. Brash & Son—Opinion of Court.*

---

3d. The letters of S. Brash & Son, and of Henry Brash, the parties in interest, throw light upon the obscure portions of the memorandum and should have been admitted to make it clear if it could not be understood without them.

4th. If the former points are established a new trial should have been granted so that all the legal evidence might have been submitted to the jury.

5th. The case as presented does not deal with the various defences set up, and as the burden of proving these rests with defendants, they cannot now be considered, and we are prepared to meet them should we hereafter have the opportunity. Omitting these matters the case before the court as presented in behalf of plaintiffs is meritorious. A fair bargain has been made, defendants have received and retain our money and refuse to do as they promised, protecting themselves by a harsh interpretation of a statute that was intended to check perjury and not to encourage defaults. Baylies on Sureties, 109 and 110; Brandt on Sureties, §§66 and 77.

*Liddon & Carter* for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

The statute reads, that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized.

The paper signed by the defendants offered here to sustain the plaintiffs' declaration does not contain a promise to pay the debt of H. Brash, due to plaintiffs. It is admitted

---

---

**Eckman & Vetsburg v. Brash & Son—Opinion of Court.**

---

---

by the pleadings of both parties that Mr. Deitsch is the agent of Eckman & Vetsburg, and that "Eckman and V.," in the paper offered, means Eckman & Vetsburg, the plaintiffs. It is also admitted that "Apala" in the writing means Apalachicola; and it is further admitted that the sum of forty-nine dollars and sixty-five cents was paid by Mr. Deitsch in behalf of Eckman & Vetsburg to Henry Brash, of the firm of S. Brash & Son, as stated in the paper signed S. Brash & Son, at the date thereof. The memorandum then is as follows:

"Received of Eckman & Vetsburg, forty-nine and sixty-five one-hundredths dollars, as commission for guarantee of H. Brash's Apalachicola account, which account has been settled by him in full with note.

"(Signed)

S. BRASH & SON."

The plain English of this is that there had been a guaranty by defendants of some sort, to the plaintiffs, of an account of H. Brash. Whether it was a guaranty of payment, or that it was collectable, or that H. Brash would settle it by note or otherwise, or what was its amount, is not stated. The guaranty itself is not exhibited.

And now, on the 11th of March, 1882, H. Brash, having settled his account with Eckman & Vetsburg by giving them his note in full, the latter pay to S. Brash & Son a commission for the guaranty and get from them this receipt showing such payment. This seems to be a closing up and settlement between these parties of the entire transaction.

This paper certainly does not contain an engagement to pay plaintiffs any sum of money due from H. Brash by note.

The "account" which had been guaranteed has been settled in full by him "by note."

The two notes set out as a bill of particulars are not mentioned in the receipt and it cannot be presumed that

---

 Eckman & Vetsburg v. Brash & Son—Opinion of Court.
 

---

y constitute *the note* mentioned therein, because the receipt does not speak of two notes. Parol testimony would be necessary to show that these two notes were intended to be referred to, and parol testimony is inadmissible to show the terms of the agreement. Most clearly then there was no agreement in writing signed by these defendants to pay Brash's notes.

It was attempted to show by the letters of one or both of the defendants, that this paper was intended to be, and was, a guarantee or promise. The judge at the trial ruled that the letters and the receipt taken together did not take the case out of the statute. We cannot discover that the court erred in this conclusion. The letters do not contain a promise but expressly deny any liability, and deny that any liability was intended to be created by the writing. I insist that the paper was unfairly obtained from them. It is true they became frightened soon after the paper was obtained, lest it might be considered a valid promise binding them to pay, but they uniformly claim in the letters that they never intended to make a promise to pay. No liability therefore grows out of the letters, as a promise to pay, by themselves, or in connection with the receipt. Indeed, some of the letters state that the money mentioned in the commissions was voluntarily urged upon them by Mr. Deitsch, he claiming that plaintiffs owed it to them upon the prior guaranty of the account. This view accords with the legitimate construction of the receipt.

It is claimed that the court committed an error in refusing to permit plaintiffs to prove by the witness, Deitsch, the circumstances under which the receipt was given, and the money paid. No offer was made to prove any fact not admitted in the pleadings. It is difficult to imagine any material circumstances other than those gathered from the pleadings of the parties, which can be shown without al-

---

---

**Eckman & Vetsburg v. Brash & Son—Opinion of Court.**

---

---

tering or adding to the terms of the paper itself. In the light of the concurrence of facts stated in the pleadings by the parties the paper is intelligible. Any parol testimony which would convert it into a promise to pay the debt of another person would change the contract and convert it into something which it is not.

“If the agreement is certain and explained in writing, signed by the parties, that binds them; if not, and evidence is necessary to prove what the terms were, to admit it would effectually break in upon the statute, and introduce all the mischiefs, inconvenience and uncertainty the statute was designed to prevent.” *Brodie vs. St. Paul*, 1 Ves., Jr., 326.

Every agreement which is required to be in writing by the statute of frauds must be certain in itself, or capable of being made so by a reference to something else whereof the terms can be ascertained with reasonable certainty without recourse to parol proof, or it will not be carried into effect. *Braden vs. Bradlea*, 12 Ves., 466; *Abeel vs. Radcliff*, 13 Johns., 297; *Ide & Smith vs. Stanton*, 15 Vt., 685; *Bailey vs. Ogden*, 3 Johns., 399; *Peltier vs. Collins*, 3 Wend., 457.

The doctrine of the courts in the application of the statute of frauds is, that a promise by a defendant to pay the debt of another must be wholly in writing, and if parol evidence is necessary to an understanding of the terms of the entire contract with reasonable certainty; if its terms must be supplied by parol, it is within the statute and cannot be enforced. While it is permitted to prove the circumstances under which a contract was made, it is not manifest that all material circumstances were not before the court, or that the terms of the agreement were not clearly understood by the concurrent averments of the pleadings.

---

---

**Read v. Gooding, Mull & Co.—Syllabus.**

---

---

It is insisted that the receipt offered in evidence shows that the defendants have received plaintiffs' money, which the verdict of the jury enables them to retain, and that the jury ought at least to have found the amount in favor of plaintiffs. It does not appear that any such claim was made before the court and jury. It was first suggested in the motion for a new trial. There is no count in the declaration under which a return of that money could be claimed. It is not a claim for goods sold and delivered; nor for money paid by plaintiffs for and at request of defendants; nor for money due on account stated. The jury were charged by the court that there was no evidence before them in support of the plaintiffs' declaration and no exception was taken to the charge.

In fact the receipt itself implies that the money, \$49.65, was paid for commissions upon a guaranty of an account, which account had been settled in full by the note of the debtor.

No error is apparent in the record, and the judgment is affirmed.

---

G. W. READ, APPELLANT, VS. GOODING, MULL & CO., APPELLEES.

An appeal does not lie from an order, in a case at law, granting a continuance. Such order may be assigned for error upon an appeal from the final judgment.

Appeal from the Circuit Court for Orange county.

The facts of the case are stated in the opinion.

*Alex. St.-Clair Abrams* for Appellants.

---

---

Pells v. The State—Statement of Case.

---

---

THE CHIEF-JUSTICE delivered the opinion of the court.

This is an appeal from an order in a suit at law granting a continuance, no final judgment having been entered in the cause. The ground of the appeal is that the affidavit is not sufficient to authorize a continuance. It is stated by appellant that the object of the appeal is to obtain an expression of the opinion of this court upon the question of practice involved.

The statute does not provide for an appeal to this court, in a suit at law, except from a final judgment. It does provide, however, that all orders granting or refusing to grant a continuance in any cause may be assigned for error upon an appeal taken, but this appeal must be from a final judgment. We have no jurisdiction of the case under the appeal here taken.

The appeal is dismissed.

---

WILLIAM PELLs, PLAINTIFF IN ERROR, vs. THE STATE OF  
FLORIDA, DEFENDANT IN ERROR.

1. An indictment charging that the accused broke and entered, with intent to commit a felony, "a certain building, to wit: the Main Exhibition Building of the Middle Florida Agricultural and Mechanical Fair Association," is fatally defective in not alleging that the building is the property of a corporation or persons.
2. The rule is well settled, that the ownership of the building so burglariously entered must be alleged in the indictment.

Writ of Error to the Circuit Court for Leon county.

This case was heard before Judge Vann, of the Third Circuit, presiding in Leon county. The other facts are stated in the opinion.



---

---

Pells v. The State—Opinion of Court.

---

---

*R. B. Hilton, John W. Mitchell and John S. Beard, for Plaintiff in Error.*

*The Attorney-General for the State.*

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

In November, 1882, the grand jury of Leon county found an indictment against William Pells, charging that he, on the twelfth day of January, A. D. 1881, "with force and arms, at, and in the county of Leon aforesaid, a certain building, to wit: the Main Exhibition Building of the Middle Florida Agricultural and Mechanical Fair Association, there situated, in the night time of said day, to wit: at about the hour of nine o'clock at night, feloniously and burglariously did break and enter with intent to commit a felony, to wit: to steal, take and carry away goods and chattels of the value of more than twenty dollars," &c., &c. The defendant was tried and found guilty. He moved for a new trial upon several grounds, among which was, that: "There was no evidence before the jury to show the ownership of the buildings into which the breaking and entry are alleged to have been made. It was not shown to have been the property of any individual or individuals or of any corporation, and was conceded by the State Attorney not to have been the property of a corporation but of the people living all over Middle Florida." The motion was denied and defendant duly excepted.

The defendant by his counsel then made a motion in arrest of judgment on several grounds, the only ones of which it is necessary to consider are similar to the one above noted in the motion for a new trial, viz:

"That the said indictment does not allege the ownership

---



---

Pells v. The State—Opinion of Court.

---



---

of said building, and does not set forth the name of ~~any~~ owner or owners thereof."

"That said indictment does not allege the ownership of said building to have been in any corporation."

The motion in arrest of judgment was denied and the ~~de~~ defendant brings his writ of error.

The indictment is bad, and the motion in arrest of judgment should have been granted. It contains but a single count, in which the building is described as "The Main ~~Ex~~hibition Building of the Middle Florida Agricultural and Mechanical Fair Association." The ownership of the property is defectively stated. There is no allegation that such Association is incorporated. If it belonged to an unincorporated Association, the individuals comprising such Association are the owners, and their several names should have appeared in the indictment as such owners. If the ownership of the property is not stated, *non constat* but that ~~the~~ building was the property of the defendant, or that he ~~was~~ part owner as one of the Association. The rule is well settled that the ownership of the building so burglariously entered must be alleged. "The name of the owner of the dwelling house or of the building which was broken and entered must be stated with accuracy." Heard's Criminal Law, 436; 1 Bishop on Crim. Prac., §583; 1 Wharton on Crim. L., §816; Beale vs. The State, 53 Ala., 460; State of Kansas vs Fockler, 22 Kan., 542; State vs. Morrissey, 22 Iowa, 158; Wallace vs. State of Illinois, 63 Ill., 451; Jackson vs. The State, 55 Wis., 589; Com. vs. Perris, 108 Mass., 1.

The indictment in this case is fatally defective and the judgment is arrested and the defendant ordered to be discharged from imprisonment on the indictment, judgment and sentence herein.

---

---

Williams v. The State—Opinion of Court.

---

---

ARTHUR WILLIAMS, PLAINTIFF IN ERROR, vs. THE STATE  
OF FLORIDA, DEFENDANT IN ERROR.

At common law, a boy under the age of fourteen years is presumed to be incapable of committing the crime of rape.

Writ of Error to the Circuit Court for Orange county.

The facts of the case are stated in the opinion.

*Wm. Scott and J. Hugh Murphy* for Plaintiff in Error.

*The Attorney-General* for The State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

The plaintiff in error in this case was indicted in the month of March, A. D. 1883, in the county of Orange, for the crime of rape. He plead not guilty, was tried in July of the same year, and was, by the verdict of the jury, found guilty. Counsel for defendant moved for a new trial, upon certain grounds set out in the notice. The motion was denied by the court, and the counsel duly excepted to the judgment of the court. The defendant was thereupon sentenced to death, and brings his writ of error.

From the evidence brought up in the bill of exceptions, it appears that a married woman was stopped by a negro, whom she identified as this defendant; that he caught her by the arm, dragged her into the bushes and outraged her; that she was in feeble health, frightened and unnerved; that he remained with her about one hour. It also appears that the defendant was not fourteen years of age, but was between thirteen and fourteen years of age.

The court charged the jury, among other things, that "rape is the carnal knowledge of a female forcibly and

---

 Williams v. The State—Opinion of Court.
 

---

against her will. There is a presumption of law that = an infant under fourteen is incapable of committing or ~~an~~ attempting to commit the crime; yet it has been held that . an infant under age may be convicted of an attempt; you ha~~ve~~ heard the testimony as to his age, you are judges of its fo~~ur~~ ~~orce~~ and truth."

Subsequently the jury was recalled and a further instr~~uc~~tion given to them as follows: "An infant under fourte~~en~~ years is presumed to be unable to commit a rape, but y~~ou~~ must be satisfied that he is under that age, and incapab~~le~~ ble, from the testimony and appearance."

The evidence in respect to the age of the defendant w~~as~~ was as follows: Peter Williams, a brother of the defendant, w~~as~~ was called by the State, and on his cross-examination testifi~~ed~~ fied that the defendant was between thirteen and fourteen ye~~ars~~ ars of age; that he knew of his brother's age from what ~~his~~ his father had told him. The defendant, in making his sta~~te~~atement under oath, said that according to his mother's sta~~te~~atement he was thirteen years of age. To this proof ~~and~~ and statement there was no objection, nor was there any c~~on~~ontradictory or other evidence upon the subject.

The charge of the court that the jury "must be satis~~fy~~ fied that he is under that age, and incapable from the testim~~ony~~ ony and appearance," is clearly wrong.

The statutes of this State fix no age within whic~~h~~ h a person is incapable of committing this crime, but the c~~om~~ommon law is explicit upon the subject, and the author~~ities~~ ties are numerous. It presumes that an infant under four~~teen~~ een years of age is unable to commit the crime of rape, and therefore that he cannot be guilty of it. In 1 Hale's P. C., 629, it is said: "An infant under the age of fourteen years is presumed by law unable to commit a rape, and therefore it seems cannot be guilty of it, and though in other felonies *malitia supplet aetatem* in some cases as has been shown,

---

---

Williams v. The State—Opinion of Court.

---

---

yet it seems as to this fact the law presumes him impotent, as well as wanting discretion." King vs. Groombridge, 7 Car. & Payne, 582; Regina vs. Brimilou, 9 Ib., 366; Regina vs. Philips, 8 Ib., 736; Roscoe's Crim. Ev., 859.

In 1 Wharton's Crim. Law, §551, it is said: "At common law a boy under fourteen is irrebuttably presumed to be incapable of committing a rape." "In New York and Ohio, this presumption is held to be rebuttable. Whether a boy under fourteen is indictable at common law, for an assault with intent to ravish, has been disputed. The affirmative has been maintained in Massachusetts; and in New York it has been held that while there is a presumption of incapacity, this presumption may be overcome by counter proof. In England and in North Carolina the presumption of incapacity is irrebuttable." In no State, however, so far as we are able to find, has it been held that a boy under fourteen could be convicted upon an indictment for rape. If the rule be such, then the charge of the court that the jury "must be satisfied that he is under that age, and incapable, from the testimony *and appearance*," had a tendency to mislead them. The *appearance* alone of the boy is not legal evidence against him of either age or puberty and there certainly was no testimony to show that he was older than fourteen, or even that he had arrived at that age. In Ohio it is held that "an infant under the age of fourteen years is presumed to be incapable of committing the crime of rape, or an attempt to commit it, but that presumption may be rebutted by proof that he has arrived at the age of puberty and is capable of emission and consummating the crime." Williams vs. The State, 14 Ohio R., 222.

The same rule prevails in New York. The People vs. Randolph, 2 P. C. R., 174; see also Com. vs. Green, 2 Pic., 380.

As, however, there was no evidence tending to prove

---

 Small v. The State—Opinion of Court.
 

---

such a state of facts, this question does not arise in this case and we therefore refrain from expressing any opinion.

It is not necessary to notice the other errors assigned, for the judgment must be reversed and a new trial ordered.

---

JOE SMALL, PLAINTIFF IN ERROR, VS. THE STATE OF  
FLORIDA, DEFENDANT IN ERROR.

Where the whole evidence in a criminal case is brought up by a writ of error and fails entirely to prove the charges made in the indictment, this court will reverse the judgment and award a new trial.

Writ of Error to the Circuit Court for Marion county—

The facts of the case are stated in the opinion.

*Miller & Spencer* and *R. B. Hilton* for Plaintiff in Error.

*The Attorney-General* for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

At the October term of the Circuit Court held in and for the county of Marion in the year A. D. 1883, the plaintiff in error, Joe Small, was indicted for an assault with a loaded pistol upon Elijah Ferguson, with a premeditated design to effect his death, and charging him with being guilty of an assault with intent to kill and murder. At the same term of the court the defendant was tried and found guilty. The counsel for defendant moved for a new trial upon several grounds, among which are the following:

“Because the verdict of the jury is contrary to the evidence, and without the evidence to support it.”

---

---

Small v. The State—Opinion of Court.

---

---

“Because the verdict of the jury is contrary to law, and the charge of the court.”

This motion was denied and an exception thereto duly taken.

Counsel then moved in arrest of judgment upon several grounds, which motion was also denied, and an exception taken.

From the judgment of the court the defendant brings his writ of error, and assigns for error, among others, that the court erred in not granting a new trial, upon the grounds and for the reasons set forth in the said motion.

On the trial of the case, Elijah Ferguson testified that he, on the 18th day of October, 1883, left Ocala about half-past eleven o'clock at night to go home. “As I got in a thick oak grove in front of Mr. Trantham's house, some one on horseback rode very near to me; liked to have rode over me; I said to him d—n you, who are you? Who are you trying to ride over? He replied, ‘G—d d—n you, who the h—ll are you?’ After he spoke I recognized him by his voice to be Joe Small. He then whirled his horse, dismounted and shot at me twice with a pistol. Knew it was a pistol by the report.” On his cross-examination he further testified as follows: “I had never spoken to him in my life, and he had never spoken to me at that time. I did not know him before that time. This was between eleven and twelve o'clock on the night of October 18th, 1883. I could not tell what kind of a horse he was on, as it was pretty dark when he rode past me, and when he shot the horse was jumping and trying to break loose; when I said that I didn't know Joe Small, I meant to be understood simply that I had never spoken to him or he to me. I did know him by sight, have known him for some years. Have seen him now and then on the streets and been told that his

---

---

Small v. The State—Opinion of Court.

---

---

name was Joe Small. There is nothing peculiar in his voice. I *believe* it was Joe Small.”

Claiborne Hamilton, introduced as a witness on the part of the people, testified that on the “eighteenth day of October I remained at McGrath’s bar-room in the town of Ocala until they started to shut up. Mr. Strobhar looked at his watch and said it was twelve o’clock. I then got a quart of whiskey and started home. As I was going across the narrow gauge railway I met a man coming south across said railway, coming into town on horseback. I *took it to be Joe Small*. Shortly after the man passed me I heard a pistol shot. It was about two hundred yards from where Small passed me to the place where I heard the pistol shoot. Small, when he passed me, was going in that direction—the direction of the woods in front of Dr. Trantham’s. I said to myself, ‘I wonder who the d—l is that shooting at me; I haven’t done nobody nothin.’” On his cross-examination, he testified: “I would not swear the man I met was Joe Small. I took it to be him. I did not speak to him, nor he to me. At the time the pistol was shot I was one hundred or one hundred and fifty yards on the other side of the railroad. The oak grove in front of Mr. Trantham’s is about one hundred yards on the south side of the railroad.”

William E. Schoeflin, on the part of the State, testified: “I am Marshal of the town of Ocala. I saw Small here on the night of October 18th on horseback. I had just blown the whistle for my deputy to come on duty. He comes on at nine o’clock.”

This was all the proof on the part of the people. There is not sufficient evidence to convict Small of the offence. Ferguson’s evidence is defective in that he does not positively identify the accused, nor is there evidence of a pre-



---

---

**Small v. The State—Opinion of Court.**

---

---

meditated design to effect the death as charged. In fact, it nowhere appears that the pistol, if fired, was pointed at him, or intended to be pointed at him. The proof of the witness, Hamilton, goes to show that he thought somebody was shooting at him, and with equal reason he might have been the complainant in this cause. He does not identify the accused. He swears, "I would not swear the man I met was Joe Small; I took it to be him."

The Marshal only testified that he saw Small in Ocala about nine o'clock on horseback on that night. This might be all true, and yet Joe Small innocent of the alleged crime which was committed, if at all, between eleven and twelve o'clock the same night. Ferguson had never spoken to Small, nor Small to him, yet in the dark night, so dark that he could "not tell what kind of a horse he was on," he recognized him by his voice, which he says was not peculiar, and believed it to be him. The evidence is defective and no man should be convicted thereon of a crime punished so severely as that of a premeditated attempt "to kill and murder." But this is not all. The defence introduced witnesses to prove an alibi.

William Lucius testified "that on the 18th day of October, 1883, I met Joe Small in Mr. Robinson's store in the town of Ocala. We left Ocala at about seven o'clock P. M. and rode south about seven miles where we parted, he going up to Gilbert Little's house, where he (Small) stays. I went on home. We parted between eight and nine o'clock near Gilbert Little's house." Gilbert Little testified: "Joe Small stays at my house. On the 18th October he had been to town and come home betwixt eight and nine o'clock. After feeding his horse he came into the house and ate his supper. He then commenced teaching me a lesson in arithmetic. It was after twelve o'clock before he went to bed. I went to bed a quarter or a half hour after

---

---

Davidson v. The State ex rel.—Syllabus.

---

---

he did. I swear positively he could not have been in town that night at any time between the hours of nine o'clock and twelve o'clock, because I was with him all the time between those hours. Sandy Williams and Alexander Holloman were at my house. Joe was not in town that night after nine o'clock, I know."

Sandy Williams testified: "On the night of the 18th day of October, 1883, just before ten o'clock, I left my shop to go over to Gilbert Little's. It is about half a mile from my shop to Gilbert Little's. When I got to his house I found Joe Small sitting down there teaching Little some kind of a lesson. I got there about eleven o'clock and remained until after twelve. Gilbert Little, Joe Small and Alexander Holloman were present."

This is the substance of all the evidence in the record. There was no rebuttal to defendant's evidence, and no attempt to impeach the reputation of the accused's witnesses for truth. The State did not prove sufficient to warrant a conviction for a felony, and the evidence of an alibi is certainly sufficient of itself to warrant the court in granting a new trial.

The judgment is reversed on this ground alone, and a new trial ordered.

---

P. H. DAVIDSON, APPELLANT, VS. THE STATE, EX REL  
JAMES BANKS, APPELLEE.

Leave to file an information in the nature of a *quo warranto* may be granted for the purpose of determining the right of a contending parties to exercise an office or franchise pertaining to a private corporation created for benevolent purposes.

Appeal from the Circuit Court for Escambia county.

---

**Davidson v. The State ex rel.—Argument of Counsel.**

---

The facts of the case are stated in the opinion.

*J. D. Thompson* for Appellant.

The Constitution of Florida, Article 4, Section 27, provides, that "the Legislature shall provide for the election by the people, or appointment by the Governor, of all State, county or municipal officers not otherwise provided for by this Constitution, and fix their duties and compensation." The Legislature in carrying out this provision of the Constitution has provided for the appointment of such officers, and have prescribed certain pre-requisites and qualifications; such as taking an oath of office, and that they shall be entitled to just so much compensation, and that it shall be extortion for any officer to charge any more than the prescribed fee or salary.

The appellant now contends that the position of President of the Stevedore's Benevolent Association is not such an office or franchise as can be reached or inquired into by information in the nature of a *quo warranto*. It is not such an office or franchise as the Attorney General is limited to prosecuting for. The Attorney General is limited by statute in this State to bringing his suit for an office. Vide *McClellan's Digest*, page 846, section 1, 2 and 3. In construing the provisions of a statute or Constitution care must be had to the intention of the law makers. In the *Raleigh and Gaston R. R. Co. vs. Reid*, 13 Wallace, 269-70, the Supreme Court of the United States says, that "when a statute or Constitution limits a thing to be done in a particular mode, it includes a negative of any other mode." Reasoning from the language here used, we say that when a statute or Constitution limits itself to the doing of a particular thing it includes a negative of any other thing. It is not necessary that the statute should expressly prohibit the At-

---

---

Davidson v. The State ex rel.—Argument of Counsel.

---

---

torney General from bringing his suit for an office, or such franchise as the public are interested in, because as is said by Denio, C. J., in the People vs. Draper, 15 N. Y., 532, 543 544, "I do not mean that the power must be expressly inhibited, for there are but few positive restraints. Every positive direction contains an implication against anything contrary to it which would frustrate or disappoint the purpose of that provision." Vide also Potter's Dwarries on Statutes, page 64.

Having now discussed the power and right of the Attorney General under our statutes, and assuming that we have reached the conclusion that he is limited to cases where an office is in question, we next inquire what is an office such as to come within the scope of a *quo warranto* information? An office such as to properly come within the legitimate scope of a *quo warranto* information may be defined as a public position, to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public. Vide High's Ex. Legal Remedies, section 625; United States vs. Lockwood, 1 Penny's Wis., 359.

There are three tests to be applied in determining whether an information will lie to test the incumbent's right to exercise the office. These are first, the source of the office; second, its tenure; and third, its duties. The source of the office should be from the sovereign authority; either by charter or legislative enactment, its tenure should be fixed and permanent, and its duties should be of a public nature. Vide High's Ex. Legal Remedies, section 626. Applying these tests, the information will lie for the office of guardian of the poor, which is of a public character, created by statute and entrusted with the performance of public duties. And applying the same standard, it will be refused

---

**Davidson v. The State ex rel.—Argument of Counsel.**

---

for an office in a private association of a purely eleemosynary character, where the office or position partakes neither of a public or quasi-public nature. Vide High's Ex. Legal Remedies, section 626. Regina vs. Hampton, 13 L. T. R. N. S., 431; Regina vs. Guardians of the poor, 17 Ad. and E. N. S., 149. In passing upon a very similar question to this our own Supreme Court, in the State *ex rel.* Attorney General vs. Jones, 16 Florida, 306 to 311, inclusive, say: "While we think it clear that a pilot is not an officer within the meaning of the Constitution, still he is invested with powers and privileges which do not appertain or belong to every citizen. In this country, and under our institutions, such rights, privileges and powers as these, invested by law in the citizen, being of a public nature appertaining to commerce and exercised by virtue of legislative grant, are franchises."

This court, therefore, has clearly drawn and defined the line of demarkation, and the limit to which the courts of this State may go in applying the remedy of *quo warranto*.

The line of distinction here drawn, is that the franchise (if such it is) must be such an one as the public are not only nominally but substantially interested in. Now we ask what interest has the public in a benevolent society other than to make it conform to the laws of the community where they may chance to exist, as any other private individual. There is no period of office fixed by law, no qualification fixed by law, no duty that the President of such an institution is bound to perform, other than such as his society may prescribe. Then where is the interest of the public? Franchises are immunities and privileges in which the public have an interest as contradistinguished from private rights, and cannot be exercised without authority from the sovereign power. Vide the People vs. The Utica Insurance Co., 15 John., 387; The People *ex rel.*

---

---

Davidson v. The State ex rel.—Opinion of Court.

---

---

Kemer *et al.* vs. Ridgeley *et al.*, 21 Ill., page 66. So the jurisdiction of the courts ceases here. Unless the case be such as the public are interested in, and one in which there is the attempted exercise of an office, or use of a franchise without authority of law, the jurisdiction of the court does not attach.

*S. Belden* on the same side.

*S. R. Mallory* for the Relator.

THE CHIEF-JUSTICE delivered the opinion of the court.

Respondent, the relator, filed an information in the nature of a *quo warranto* in the Circuit Court for Escambia county against appellant, on leave of the Attorney General, to try the right of appellant to hold the office of President of Stevedore's Benevolent Association No. 2, a corporation organized under the laws of this State, at Pensacola. Relator alleges that he is the rightful President of the Association, duly elected according to its laws, and that appellant has unlawfully usurped said office, and is performing the functions and franchises thereof to the exclusion and the damage of the relator, who is entitled to exercise the said functions and franchises.

Appellant demurred on the grounds, first, that the information did not present a case for the interference of the court. Second, that the court was without jurisdiction. Third, that the Attorney General could not sue except in cases involving the right to a public office.

The court overruled the demurrer, and issue having been joined the cause was tried by the court and judgment of ouster was rendered against appellant and that relator was entitled.

Appellant says the judgment on the demurreer sustaining

---

---

**Davidson v. The State ex rel.—Opinion of Court.**

---

---

e jurisdiction is erroneous and prays a reversal of the  
al judgment.

This case was substantially decided in *State vs. Jones*,  
Fla., 306, where the court said “a pilot is not an officer  
thin the meaning of the Constitution, still he is invested  
th powers and privileges which do not appertain or be-  
ng to every citizen.” This is a franchise. “When such  
anchises are granted, and in order to their exercise quali-  
ations are prescribed, the exercise of such franchises by a  
rson not having the requisite qualifications is a usurpa-  
on.” The information in that case was sustained.

The property of an information in the nature of a *quo*  
*warranto* as a remedy for an unlawful usurpation of an office

a merely private corporation was formerly involved in  
me doubt, but the question may now be regarded as set-  
ed in this country. Tested by the principles underlying  
e jurisdiction in question, an intrusion into an office of a  
erely private corporation may in this country be corrected  
information with the same propriety as in cases of public  
municipal corporations, since in both cases there is an  
ufounded claim to the exercise of a corporate franchise,  
ounting to a usurpation of the privilege granted by the  
ate. Indeed, the intrusion into a corporate office, created  
r the government and exercise of the franchise, cannot in  
inciple be distinguished from a usurpation of the fran-  
ise itself. High’s Ex. L. Remedies, secs. 653, 654, 655,  
nd authorities cited, where the whole question is discussed  
nd illustrated. The cases of officers of banks, insurance  
panies, churches and other like incorporations of a pri-  
ate nature in which the jurisdiction is maintained in the  
ldjudications referred to, are directly decisive of the ques-  
on here.

But it is urged that by the statute the right of the Attor-  
ey General to file or authorize the information is confirmed

---

---

**Matheson et al. v. Thompson—Statement of Case.**

---

---

to cases in which public officers are involved. This is a misapprehension of the object of the statute. Its purpose is to regulate the proceedings in certain aspects and to prescribe the effect of judgments in certain cases. It neither creates nor limits the right of the Attorney General or of private persons to institute the proceedings, as such right existed before the act of February 2, 1872, (ch. 1874.)

The judgment is affirmed.

---

**JAMES D. MATHESON ET AL., APPELLANTS, VS. SAMUEL B. THOMPSON, APPELLEE.**

1. When a mortgage debt has been paid, and the mortgage afterwards assigned in form, and then foreclosed by the assignee without making the holder of the legal title a party to the foreclosure, in a suit by the latter to set aside the foreclosure decree, and the deed executed under it as a cloud upon his title, the mortgages are not necessary parties.
2. Where two mortgages upon different parcels of property are given to secure the same debt, a payment and satisfaction of one is a satisfaction of both mortgages.
3. A foreclosure being had by the assignees of a satisfied mortgage under which a decree and deed are procured, a grantee of the mortgagor not being made a party, and having no notice of the proceeding until after a sale under the decree, such grantee may maintain a suit in equity to enjoin the parties from conveying or asserting claim to the property, and to annul such decree and deed, the same being a cloud upon his title.

Appeal from the Circuit Court for Duval county.

Samuel B. Thompson filed his bill in equity against James D. Matheson and Augusta S. Matheson, his wife, Charles E. Haile, and Elise W. Haile, his wife, and John S. Ramsey, in the Circuit Court for Alachua county, for the purpose of removing certain clouds upon the title to a lot



---

---

**Matheson et al. v. Thompson—Statement of Case.**

---

---

land owned by him. The venue was changed to Duval county, where the Chancellor rendered a decree sustaining the bill, and the defendants (except Ramsey) appealed.

The bill alleges that on the twelfth day of June, 1857, the Alexander Matheson, being the owner of two lots of land known as lots two and three adjoining Gainesville, executed to Tillman Ingram and E. E. Adamson, a mortgage on the lots of land and on a number of slaves, to secure a note of the same date given by Alexander Matheson to said Ingram and Adamson for \$15,000, with interest. Afterwards, on the tenth day of March, 1858, Alexander Matheson conveyed by deed to complainant, S. B. Thompson, one of the lots, to wit: lot three, which deed was duly recorded on the 27th March, 1858. The bill alleges that on the 29th April, 1875, the defendants, Matheson and wife, and Haile and wife, filed their bill in equity in the Circuit Court of Alachua county against Alexander Matheson, the mortgagor, to foreclose the mortgage therein, alleging that in January, 1873, Ingram and Adamson, mortgagees, had duly assigned the mortgage to Mrs. Augusta Matheson, and that in October, 1873, Mrs. Matheson assigned to Mrs. Haile a certain share or interest in the mortgage. On the 20th September, 1875, Mrs. Matheson and Mrs. Haile and their husbands obtained a final decree of foreclosure in their suit and for a sale of said lots, and the same were sold by the sheriff under such decree to Mrs. Haile, one of the defendants, and a deed thereof was duly executed by the sheriff. Mrs. Haile, one of the defendants, afterwards conveyed complainant's lot to Ramsey, who mortgaged the same to Mrs. Haile to secure the purchase money. The bill charges that the note, which is mentioned in the mortgage, was not assigned by Ingram and Adamson to the defendants or either of them. That Ingram long before

---

---

**Matheson et al. v. Thompson—Statement of Case.**

---

---

the pretended assignment filed his petition in bankruptcy and assigned his interest in the mortgage to the assignee in bankruptcy, and that his pretended assignment to the defendants was void. That the said mortgagee and the indebtedness thereby secured had been fully paid and satisfied, to wit: in February, 1859, and the same was satisfied of record, whereby the pretended assignment of Ingram and Adamson to these defendants, and the decree and sale thereunder were fraudulent, the defendants having notice of the satisfaction of the mortgage and of the complainant's title.

The bill prays an injunction restraining the defendants or either of them from selling, conveying or otherwise interfering with the lot as aforesaid conveyed to complainant.

The defendants answering admit the conveyance of the lot, number three, to complainant, and the recording of their deed as alleged, but deny that complainant had been in possession or paid taxes thereon. They deny that the mortgage was paid or satisfied. Aver that Mrs. Haile became the purchaser at the sale under the foreclosure proceedings. Deny that there was any fraud in the assignment of the mortgage, and that it was in all respects, "legal, fair and regular, and that they were innocent, *bona fide* purchasers of the mortgage, and that they paid a good, legal and valuable consideration therefor." That complainant's title is subsequent to and subject to the mortgage lien.

They deny knowledge of the satisfaction of the mortgage, and deny that any satisfaction or discharge thereof was of record. Deny that the foreclosure proceedings were fraudulent as to complainant's rights.

Defendant Ramsey admits that the lot, No. 3, was conveyed to him by Haile and wife in December, 1877, but denies that he had full notice of complainant's title, and

---

---

**Matheson et al. v. Thompson—Opinion of Court.**

---

---

claims that he is an innocent purchaser, but had notice of the record of complainant's deed from A. Matheson, and insists that complainant's title was subject to the mortgage and claims title as against him.

Testimony was taken, and the cause submitted to the court and a decree entered declaring the foreclosure proceedings to be of no force as against the complainant's title, setting aside the sheriff's deed under the decree and the deed of Haile and wife to Ramsey, and declaring them to be void and of no effect as against said lot, and directing the same to be cancelled of record, and enjoining defendants and all persons claiming through or under them from setting up any claim to the property claimed by complainant.

Appellants pray a reversal on the grounds:

1st. That the mortgagees Ingram and Adamson were necessary parties.

2d. That complainant's bill should be denied on account of his long delay in bringing suit.

3d. That complainant was not entitled to the relief sought, but at most had only a right to redeem under the mortgage.

4th. It was error to annul the foreclosure proceedings.

5th. It was error to annul the deeds to Mrs. Haile under the foreclosure sale, and her deed to Ramsey.

6th. The injunction was erroneous and the decree not warranted by the law and the evidence.

*J. J. and S. Y. Finley and W. W. Hampton* for Appellants.

*E. C. F. Sanchez* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

The first ground upon which a reversal of the decree is

---

---

**Matheson et al. v. Thompson—Opinion of Court.**

---

---

prayed is that the mortgagees, Ingram and Adamson, are not parties to this suit.

This question is mooted now for the first time by the petition of appeal. No such question was made in the court below, and this practice of suggesting new questions after an appeal is not entitled to much favor, especially, as in the present case, where no decree is prayed affecting persons who are not parties, and all the interests of present parties can be fully determined without the presence of others.

According to the pleadings of these parties the mortgagees had assigned their entire interest in the mortgage to one of the defendants. The mortgagees, therefore, had no interest in the mortgage or in its proceeds. If the mortgage was inoperative for any cause as against complainant by reason of any fraud or because it had been paid before it was assigned to Mrs. Haile, and this complainant had been made a defendant in the foreclosure proceedings of Matheson and wife and Haile and wife against the mortgagor, surely it cannot be denied that the present complainant could have interposed a defence to the foreclosure upon the grounds alleged in the present bill, though the mortgagees were not parties to the foreclosure suit.

This complainant seeks relief against the proceedings and conduct of the defendants, and not against the assignors of the mortgage, and the decree complained of by these appellants in no manner affects the mortgagees. We fail to comprehend in what respect or to what end they should have been made parties here.

The second ground of alleged error in the decree is that a long time has elapsed after the right to proceed had accrued, before this suit was commenced.

The sheriff's deed on the foreclosure against the mortga-

---

---

**Matheson et al. v. Thompson—Opinion of Court.**

---

---

gor to Mrs. Haile bears date November 2, 1875, and was recorded December 21, 1877. On the 22d December, 1877, Mrs. Haile conveyed by deed to Ramsey. This suit was commenced March 4, 1878, about two and half months after the sheriff's deed and the deed to Ramsey came to light.

(There is not to our knowledge any law of this State requiring the owner of real estate to commence suit against a party claiming title adversely, earlier than within two and a half months after his right of action accrues.

The remaining grounds of error are embraced in this: That the complainant was not entitled to the relief sought, but at most had only a right to redeem under the mortgage.

This involves a consideration of the facts presented by the pleadings and the evidence adduced by the parties.

The complainant's legal title by deed from Alexander Matheson in 1858 is admitted, but it is averred that this title is subordinate to the lien of the mortgage executed in 1857 by Alexander Matheson. Defendants claim that they derived title under the foreclosure of this mortgage; that at a sale thereunder Mrs. Haile was the purchaser, taking a deed from the sheriff, and afterwards conveyed to Ramsey, one of the defendants; that the mortgage foreclosed had been assigned by Ingram and Adamson to Mrs. Augusta S. Matheson, one of the defendants, who assigned an interest in it to Mrs. Haile, and Mrs. Matheson and Mrs. Haile, their husbands joining, foreclosed against Alexander Matheson, the mortgagor, and obtained the decree. The record of this foreclosure proceeding was put in evidence and consisted of a bill filed 29th April, 1875, on which is endorsed an admission of service signed by Matheson; a subpoena with a like admission of service; a certified copy of the mortgage; and a final decree signed by the

---

---

**Matheson et al. v. Thompson—Opinion of Court.**

---

---

Judge September 20, 1875. No other papers appear in the case. The note mentioned in the mortgage is not there, and the testimony shows that it was not produced, nor a copy of it, and its absence was not accounted for. Neither was the original mortgage or the assignment of the mortgage produced or accounted for.

Upon the trial of the present case the complainant demanded the production of the assignment of the mortgage, and defendants' counsel declined to produce it. Its contents are not disclosed. The bill of complaint in the foreclosure suit recites that "on the 21st day of January, A. D. 1873, the said Tillman Ingram and E. E. Adamson, by their certain instrument under seal of that day and date, did duly and legally assign and transfer to your oratrix, the said Augusta S. Matheson, the said mortgage deed aforesaid, together with the consideration for which said mortgage was given." No mention of the transfer of the note to the assignee is made. Mr. Ingram, in his testimony in this case, says the note was "lost or mislaid."

The record of this mortgage is exhibited, and upon the margin of the record it appears something had been written and erased. Several witnesses testify that the words erased are partially distinguishable, and after examination with a magnifying glass they testify that the words erased were "settled in full," or "satisfied in full February 2, 185—, S. P. Beville, C—." S. P. Beville, at that time, was the acting clerk of the Circuit Court, having charge of the records. This mortgage and erasure are on pages 104, 105 and 106 of Book A. of Mortgages. When the erasure was done, or by whom, does not appear. Beville, the clerk, remembers nothing of the erasure.

It appears in evidence that on the 21st day of October, 1858, the same mortgagor, Alexander Matheson, executed to Tillman Ingram and E. E. Adamson another mortgage,

---

---

**Matheson et al. v. Thompson—Opinion of Court.**

---

---

recorded October 23, 1858, in book of mortgages on pages 56 and 57, upon six hundred and forty acres of land, to secure the payment of the same note described in the mortgage of June 12th, 1857. It appears further that on the second day of February, 1859, there was filed and recorded in "Sale Book A," page 59, the following paper: "We Tillman Ingram and E. E. Adamson, acknowledge payment and satisfaction of the mortgage given by Alexander Matheson to them and recorded in the clerk's office in Alachua county in book of mortgages on pages 56 and 57, October 23, 1858, and we, by these presents, discharge him and his heirs therefrom forever. In testimony whereof we have hereunto put our hands and seals this the second day of February, A. D. eighteen hundred and fifty-nine.

"TILLMAN INGRAM, [SEAL.]

"E. E. ADAMSON, [SEAL.]

"Sealed and delivered in presence of W. H. Babcock.

"T. W. McCaa."

"Recorded in Book of Mortgages on page 59, this 2d of February, 1859. S. P. Beville, D. C."

The original of this paper was glued on the margin of the record at page 57. The signatures of the parties and witnesses was satisfactorily proved. The witness, McCaa, is dead. The witness, W. H. Babcock, testified to the signing by him as a witness to the signatures. He knew Ingram well, had been in business with him and knew his handwriting. From such knowledge he believes the signature of Tillman Ingram to be in his handwriting. Would not have witnessed the paper without being requested by one of the parties signing it and being satisfied as to the genuineness of the signatures.

Ingram testifies that the mortgage of June 12, 1857, was not paid or satisfied in any manner. That the note was taken by him to Texas and "has been lost or mislaid, as I

---

---

**Matheson et al. v. Thompson—Opinion of Court.**

---

---

*did not consider it of any value.* The mortgage was given for value, for real indebtedness to me of about \$10,000. Transferred the mortgage to Mrs. Matheson about 21st January, 1873. Did not make entry of satisfaction or authorize it to be done. Never knew that Thompson had a deed of the lot." "I never signed any instrument of any kind in presence of Babcock or any one else releasing the mortgage, nor did I deliver any such instrument to the clerk of the court, nor did I authorize the clerk of the court, S. P. Beville, to cancel the mortgage for me."

Mr. Ingram's testimony relates to the satisfaction of the mortgage of June 12, 1857. He is certainly mistaken as to the execution of the paper acknowledging payment and satisfaction of the mortgage of October 23d, 1858, which had been held by him and Adamson to secure payment of the same note mentioned in the mortgage of June 12, 1857. His attention was not drawn to the mortgage of 1858 when he was giving his testimony, nor was the acknowledgment of payment and satisfaction of that mortgage with his name attached exhibited to him.

The language of that acknowledgment is that the mortgage of October 23, 1858, which describes the same note mentioned in the mortgage of 1857, was paid and satisfied. The payment and satisfaction of the mortgage legitimately means that the debt secured by it is paid and satisfied. The result was that the mortgage of June, 1857, was satisfied, the debt being paid. Mr. Ingram perhaps thought the mortgage of 1857 was a subsisting incumbrance of some sort upon the property because it was not cancelled of record, though he did not consider the note of any value.

A peculiarity of the proceedings is that in the transfer or assignment of the mortgage by Ingram no mention is made of the note, and in the foreclosure suit neither note or mortgage was produced, nor their absence accounted for,



---

---

**Matheson et al. v. Thompson—Opinion of Court.**

---

---

nor does it appear in what manner it was ascertained how much was due thereon as a basis of the decree. Mr. Ingram says the mortgage was given by Alexander Matheson to himself and Adamson to secure them for money due, and also as security for Matheson to Kirkpatrick & Co. and others. No account seems to have been taken to ascertain the amount actually due.

In the respects that the foreclosure was had without making this complainant a party, his deed being of record, that the note and mortgage were produced or accounted for, that no evidence was taken as to the amount due, that the assignment was not produced to show what was assigned, that defendants in this suit declined to produce it, that the note and mortgage were of the age of sixteen years when the assignment is said to have been made, during which time no attempt seems to have been made to enforce the mortgage or to collect the amount due on the note, that eighteen years elapsed before the commencement of the foreclosure suit, in which suit nobody interested in the property was made defendant, that neither of the complainants had ever had possession of the note and nobody knows where it is, it is impossible to conceive that the complainant's property ought to be affected by such proceedings. See *Buckmaster vs. Kelly*, 15 Fla., 180. The foreclosure and sale, and the subsequent conveyance, are clouds upon his title which give him a standing in equity to maintain this suit. His deed was of record. The evidence of the payment of the mortgage debt was of record, and even the original satisfaction piece was pasted upon the record book. A memorandum by the clerk in the margin of the record of this mortgage, dated on the very day of the date of the satisfaction piece, to the effect that it was satisfied, had been not entirely erased. Whether this memorandum of the clerk was evidence of the satisfaction of the mortgage

---

---

**Dickson v. The State—Syllabus.**

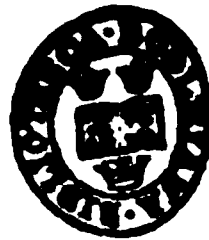
---

---

or not, the fact remains that on that day the mortgagees acknowledged payment of the debt mentioned in it and the memorandum expressed the fact.

There is a large mass of testimony in the record which is totally irrelevant to the merits of the case. Who paid the taxes? (and both parties sought to prove they paid taxes) who was the reputed owner? The sale of the lots upon an execution against a party who had no interest in it, a conveyance by the mortgagees without a foreclosure, all these and other matters foreign to the case are of no legitimate consequence, but only encumber the record.

The decree is fully sustained by the evidence and is affirmed.



---

**JUDSON DICKSON, PLAINTIFF IN ERROR, VS. THE STATE OF  
FLORIDA, DEFENDANT IN ERROR.**

1. A State Attorney has no authority to amend an indictment found by a grand jury, by his individual indorsement thereon. The only legal manner in which an amendment can be made is provided for in Chapter 1107, Laws 1860.
2. The allegation of the time or date of the commission of the offence is one of substance, and not of form. A mistake in such allegations is not susceptible of amendment.
3. The defendant was indicted in April, 1884; the offence was charged to have been committed in December, 1884; the State Attorney endorsed upon the indictment over his signature these words: "The date upon which the State relies is the tenth day of December, A. D. 1883, and not the tenth day December, A. D. 1884." *Held*, That the amendment was void and did not change the allegation in the indictment in that respect. The time alleged is matter of substance, and it being an impossible day, the indictment was bad, and the judgment is arrested.

Writ of error to the Circuit Court for Madison county.

---

---

Dickson v. The State—Opinion of Court.

---

---

The “entry” spoken of in the opinion as being “at the foot of the indictment” is below the signatures of the State Attorney to the indictment. The other facts are stated in the opinion.

*F. W. Pope* for Plaintiff in Error.

*Attorney-General* for the State.

MR. JUSTICE VANVALKENBURG delivered the opinion of the court.

In the month of April, A. D. 1884, Judson Dickson, the plaintiff in error, was indicted by the grand jury of Madison county for breaking and entering a building with intent to commit a misdemeanor. He was tried and convicted of the offence. His counsel then moved the court to arrest the judgment upon several grounds, among which is the following, viz: The indictment laid the offence December 10, 1884, and the court erred in allowing the State’s Attorney to amend it to December 10, 1883.

The court overruled the motion and the counsel for the defendant excepted to the judgment and brings his writ of error.

The indictment charges that “Judson Dickson, late of said county, laborer, on the 10th day of December, A. D. 1884, with force and arms,” &c. The remainder of the indictment is in good form. At the foot of the indictment appears the following entry in the record:

“The date upon which the State relies is the tenth day of December, A. D. 1883, and not the tenth day of December, A. D. 1884.

B. B. BLACKWELL,”

“State’s Attorney.”

It nowhere appears in the record that any motion was made to amend the indictment, or that any order to that

---

---

**Cook v. The State—Syllabus.**

---

---

effect was made by the court. The endorsement seems to have been made by the State's Attorney without authority, and can be considered in no wise the act of the grand jury. It was not done on the application of the accused, as provided for in Chapter 1107, Laws 1860. The indictment was found in April, 1884, and charges the offence to have been committed in December, 1884, more than seven months subsequent to the action of the grand jury, an impossible date. We cannot see that the State's Attorney, of his own free will, has any authority to amend in this way an indictment duly found by a grand jury. The only authority for such a proceeding is found in chapter 1107 of the laws above cited, and that law does not cover an amendment of this character. *Serpentine vs. State*, 1 Howard, (Miss.) 256; *Drummond vs. State*, 4 Texas, App., 150.

The motion in arrest of judgment should have been granted. The judgment is reversed and the defendant will be discharged from confinement under his conviction in this case.

---

**FRANKLIN COOK, PLAINTIFF IN ERROR, VS. THE STATE OF  
FLORIDA, DEFENDANT IN ERROR.**

1. It is necessary for an indictment to state the county within which the offence was committed, and the proof must affirmatively sustain such allegation.
2. In a criminal case a new trial will be granted when all the evidence taken in the court below fails to establish the venue as laid in the indictment.

Writ of Error to the Circuit Court for Orange county.  
The facts of the case are stated in the opinion.

---

---

Cook v. The State—Opinion of Court.

---

---

*E. M. Hammond* for Plaintiff in Error.

*The Attorney-General* for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

At the Fall Term of the Orange County Circuit Court in the year eighteen hundred and eighty-three the grand jury found an indictment against Franklin Cook, charging that on the first day of August, 1883, he did, with force and arms, at and in the county of Orange, “commit the crime of fornication, by then and there having carnal knowledge of the body of one Rachel Cook. The said Franklin Cook and the said Rachel Cook, each being then and there single and unmarried, and the said Franklin Cook and the said Rachel Cook not being then and there lawfully married to each other, and the said Franklin Cook and Rachel Cook being then and there within the degrees of consanguinity within which marriages are prohibited and declared by law to be incestuous and void, to wit: the said Franklin Cook being then and there the father of the said Rachel Cook, and the said Rachel Cook being then and there the daughter of the said Franklin Cook.” In May, 1884, the cause was tried and the defendant convicted. Counsel for the defendant moved for a new trial, which motion was denied, and they thereupon bring the cause to this court by writ of error.

Several alleged errors are assigned.

But one witness, Rachel Cook, was examined upon the part of the State. Two witnesses were examined upon the part of the defence; and the State’s Attorney and the counsel for the defendant have certified that “all the evidence” is embodied in the record. [There is, of course, also a bill

---

 Robinson v. The State—Opinion of Court.
 

---

of exceptions, signed and sealed by the Circuit Judge **REPORTER.**]

It is sufficient to say that the defendant was not properly convicted upon the evidence as it appears in the record. There was no venue proven. It nowhere appears in the proofs in what county or State, or in what month or year the crime was committed, if committed at all. These are material allegations, and should have been proven. *Bishop Crim. Prac.*, §384; *Holeman vs. State*, 13 Ark., 105; *Hoover vs. State*, 1 W. Va., 336; *Evans vs. State*, 17 Fla., 192; *Nelson vs. State*, 17 Ib., 195.

The judgment is reversed and new trial granted.

---

DAVID ROBINSON, PLAINTIFF IN ERROR, VS. STATE OF FLORIDA, DEFENDANT IN ERROR.

1. The venue is a necessary part of an indictment, and it must be proven as laid.
2. The time of the commission of the offence must be proven to show that the prosecution is not barred by the statute of limitations.

Writ of Error to the Circuit Court for Leon county.

This case was tried in the Circuit Court before Judge Vann, of the Third Circuit, presiding in Leon county.

The facts of the case are stated in the opinion.

*W. P. Byrd* for Plaintiff in Error.

*The Attorney-General* for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

In the month of December, A. D. 1883, at a term of the

---

---

Robinson v. The State—Opinion of Court.

---

---

Circuit Court held in and for Leon county, David Robinson was indicted by the grand jury of that county for setting fire to and burning a "certain framed gin house," &c.

The defendant plead not guilty, was duly tried and found guilty.

Counsel for the defendant then made a motion for a new trial, which was denied.

Defendant then brings the case to this court by writ of error.

The motion for a new trial should have been granted. The evidence is here in a bill of exceptions. The indictment charges the offence to have been committed on the 31st day of October, A. D. 1883, in the county of Leon, State of Florida. There is no evidence to prove the venue or the time of the commission of the offence. These are material allegations and should have been proven. The statutes of this State provide that "all offences not punishable with death shall be prosecuted within two years next after the same shall have been committed." Thomp. Dig., 490. We have had occasion to announce this rule several times. *Evans vs. The State*, 17 Fla., 192; *McCoy vs. The State*, *Ib.*, 193; *Nelson vs. The State*, *Ib.*, 195; *Cook vs. The State*, 20 Fla., *supra*.

The Judge certifies in the bill of exceptions that "the venue was proven by one of the witnesses, Dorse. In my notes of the testimony, I made a memorandum to that effect, and do not think I am mistaken, though counsel for the accused differs from me." The evidence of the venue is not in the bill of exceptions. What was the venue as proven? or what was the venue the Judge thinks was proven? Did it correspond to that laid in the indictment, or did it not? If there was such evidence it should appear in the bill of exceptions, and the fact that it was given and

---

---

Ex Parte, G. D. Powell—Syllabus.

---

---

corresponds to the allegations in the indictment cannot be inferred from such a certificate as that given above.

So far as the evidence is concerned, the offence might have been committed in any other county of this, or any other State, or at any time, before or since the adoption of our State Constitution.

Judgment reversed and new trial awarded.

---

EX PARTE, G. D. POWELL.

FIRST WRIT OF ERROR.

1. The act of Congress, February 12, 1793, relating to the rendition of fugitives from justice, requires that a copy of an indictment or an affidavit made before a magistrate, charging the person demanded with having committed a crime in the State from which he fled, shall be produced and authenticated by the Governor demanding the rendition. When an affidavit so procured does not appear to have been made before a magistrate the warrant of arrest should not be issued.
2. When the Governor issues a warrant for such arrest and recites that the demanding Executive produced and authenticated "a copy of affidavits charging" the commission of a crime, not showing that such affidavits were made before a magistrate or judicial officer, it cannot be presumed that the affidavits were made in the course of judicial proceedings for the prosecution of the person demanded, and upon its face the warrant of arrest fails to show that it was authorized by law.
3. The Executive authority in such cases can be invoked and exercised only in aid of judicial proceedings, where persons are charged before magistrates in the course of prosecutions for crime.
4. The only inquiry to be made (on *habeas corpus*) when a person has been arrested under a warrant for extradition is, whether the statutory prerequisites have been complied with.

SECOND WRIT OF ERROR.

1. This court, on writ of error, will consider only such questions as



---

---

Ex Parte, G. D. Powell—Opinion<sup>1</sup> of Court.

---

---

are presented upon the record of the proceedings in the Circuit Court. We cannot assume that facts appeared on the hearing below which are not disclosed by the record.

2. Facts or documents appearing of record in another cause should be proved by the record of that cause; and if the same are not incorporated in the record this court cannot consider them on appeal of error.
3. Petitioner having been discharged from custody by writ of *habeas corpus*, was again arrested, and now on *habeas corpus* prays to be discharged because he is arrested for the same cause from which he was before discharged. The cause of the first arrest not being shown, there is no ground for relief.

Writs of Error: 1st, to the Circuit Court for Levy county; 2d, to the Circuit Court for Alachua county.

The facts of the case are stated in the opinion.

*A. L. Hawes* for the Petitioner. 56 New York, 182; 9 Ga., 73; Hurd on Habeas Corpus, 326.

*The Attorney-General* for The State. Brown's Case, 112 Mass., 409; Com. vs. Hall, 9 Gray, 262; Davis' Case, 122 Mass., 324; Tullis vs. Fleming, 69 Ind., 15; Ex parte Swearingen, 13 S. C., 74-77; Manchester's Case, 5 Cal., 237; Kingsbury's Case, 106, 223; People vs. Donohue, 84 N. Y., 438.

THE CHIEF-JUSTICE delivered the opinion of the court.

This case comes up by writ of error to the judgment of the Circuit Court for Levy county.

Powell was arrested by the Sheriff of Levy county upon a warrant issued by the Governor of this State upon the requisition of the executive authority of the State of Georgia. The preamble of the warrant of the Governor, showing the cause of arrest, is as follows: "Whereas the executive authority of the State of Georgia has demanded of

---

---

Ex Parte, G. D. Powell—Opinion of Court.

---

---

the executive authority of the State of Florida the delivery and surrender of the body of G. D. Powell, as a fugitive from justice from said State of Georgia to said State of Florida, and has produced and filed with the executive authority of said State of Florida, to which State said G. D. Powell has fled from said State of Georgia, a copy of affidavits charging the said person so demanded with having committed in said State of Georgia, against the laws of said State of ———, the crime of larceny after a trust delegated, and which is certified as authentic by the Governor of said State of Georgia. Now, therefore, this is to command you to apprehend and arrest the body of the said G. D. Powell,” &c.

Upon the petition of Powell to be discharged, a writ of *habeas corpus* was issued to the sheriff who made return that he held petitioner in custody by virtue of the aforesaid warrant of the Governor. Thereupon counsel for petitioner insisted that the sheriff had no legal authority to hold him in custody and moved his discharge. The court denied the motion and remanded him to custody, and judgment to that effect was entered of record.

The Laws of Florida provide that it shall be the duty of the Governor of this State when demand shall be made of him by the Executive of any State or Territory, of any fugitive from justice, in the manner prescribed by the act of Congress approved 12th of February, 1793, to cause said fugitive to be arrested and secured, either by making public proclamation or by issuing an order to that effect under his hand and the seal of the State, directed to the sheriffs of the State, commanding them to arrest the fugitive therein named, &c.

The section of the act of Congress referred to is found in the Revised Statutes of the United States, and is as follows:

Sec. 5278. “Wherever the Executive authority of any

---

---

**Ex Parte, G. D. Powell—Opinion of Court.**

---

---

State or Territory demands any person as a fugitive from justice of the Executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the Executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the Executive authority making such demand, or to the agent of such authority, appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

Chief-Justice TANEY, delivering the opinion of the court in *Com. of Kentucky, vs. Denison, Governor of Ohio*, 24 How., 104, says: "The Constitution having established the right on one part and the obligation on the other, it became necessary to provide by law the mode of carrying it into execution. The Governor of the State could not, upon a charge *made before him*, demand the fugitive, for, according to the principles upon which all of our institutions are founded, the Executive department can act only in subordination to the judicial department, where rights of person or property are concerned, and its duty in these cases consists only in aiding to support the *judicial* process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judicial department. *The Executive Authority of the State, therefore, was not authorized by this article to make the demand unless the party was charged in the regular course of judicial proceedings.* And it was equally necessary that the Executive authority of the State upon which the demand was made,

---

---

Ex Parte, G. D. Powell—Opinion of Court.

---

---

when called on to render his aid, should be satisfied by competent proof that the party was *so charged*. This proceeding, when duly authenticated, is his authority for arresting the offender."

The warrant of the Governor, reciting the grounds for the issuing of the same, says, the Governor of Georgia produced and filed with him "a copy of affidavits charging the said person so demanded with having committed in said State of Georgia, against the laws of said State, the crime of larceny after a trust delegated, and which is certified as authentic by the Governor of said State of Georgia."

It is very clearly stated by Ch. J. TANEY, in the opinion referred to, that the affidavit required by the act of Congress must be made in the due course of judicial proceedings, and that the Executive authority of the State in such cases can be interposed only in aid of the courts in the due administration of justice. The act of Congress requires that the affidavit be "made before a magistrate" of the demanding State, "charging the person demanded" with having committed a crime, which affidavit shall be authenticated by the certificate of the Governor of that State. In every similar case reported, so far as we have been able to examine the decisions of other States, the affidavit presented to the Governor was made before a judicial officer in the course of a criminal prosecution.

As Judge TANEY remarks, "the Governor of a State could not, upon a charge *made before him*, demand the fugitive." An affidavit made before a Notary, or other ministerial officer or person having no judicial authority, would not authorize the Governor to make the demand. It is well known that in every State persons who are not "magistrates" are empowered to certify the acknowledgment of deeds and to administer oaths, and so it cannot be presumed that because an oath is taken the person certifying it is a

---

---

**Ex Parte, G. D. Powell—Opinion of Court.**

---

---

judicial officer, and that it is taken in the course of the administration of justice in a criminal prosecution. The act of Congress is explicit, that the "charge" must be made before a magistrate, and the demand of the fugitive must be made by the Executive authority in aid of the judicial authority in administering laws for the punishment of crime.

I should not be presumed in the absence of all evidence or recital of the fact that because the Governor of Georgia issued his requisition upon an affidavit, therefore the oath was taken before a magistrate authorized to issue process for arresting persons charged with crime. Presumptions are to be made in favor of personal liberty and upon facts. Presumptions of the existence of facts are not founded upon other presumptions or speculations. There is here no legal presumption that a criminal prosecution was commenced before a magistrate or court, from the fact that an assertion was made on oath that a crime had been committed. Such affidavits are made in civil suits as all lawyers well know, and before Notaries and Commissioners for various purposes other than the prosecution of criminals. Extrajudicial affidavits also are often made and sometimes for mischievous purposes.

The act of Congress guards against the presumptions suggested in this case by requiring the affidavit to be made before a magistrate.

The judgment of the Executive of the demanding State or of the Executive of this State, though entitled to great deference, is not by any means conclusive as to the sufficiency of the cause shown for extradition. The books are thronged with cases in which the courts have made the inquiry and decided upon the sufficiency of the cause, and in a great majority of cases have sustained the arrest upon full investigation. This very fact is authority to sustain

---

---

Ex Parte, G. D. Powell—Opinion of Court.

---

---

the power of the judiciary to make the inquiry. Any other view would make the Executive power omnipotent and emasculate to a great extent the writ of *habeas corpus*, whereby the citizen is assured that he shall not be deprived of his liberty "but by the law of the land." To this end he may demand that the law shall be strictly complied with, and that is all that is involved in the present inquiry.

"There must be a showing of sufficient ground for the arrest before the requisition can issue; and after it is issued and complied with it is competent for the courts of either State on *habeas corpus* to look into the papers, and if they show no sufficient legal cause to order the prisoners discharged." Cooley's Const. Lim., (\*16) 5th Ed., 22, Note 1, citing authorities.

An early case (*In re Clark*, 9 Wend., 213,) thus points out what is requisite to give the Governor jurisdiction to arrest and deliver a fugitive charged with crime in the demanding State: 1. The fugitive must be demanded by the Executive of the State from which he fled; 2. A copy of the indictment found, or an affidavit made before a magistrate of the State charging the fugitive with having committed the crime; 3. Such copy of the indictment or affidavit must be certified as authentic by the Executive making the demand. The propositions thus formulated have been, almost literally copied by the Judges in many of the States where the questions involved have been adjudicated. If these prerequisites have been complied with the warrant of the Governor has properly issued and the prisoner is legally restrained of his liberty. *In re Clark*, 9 Wend., 219; *Ex-parte Swearingen*, 13 S. Car., 74.

For reasons before stated we do not find in the papers evidence that all these requisites have been complied with, and therefore the warrant of the Governor is not authorized under the act of Congress and the law of this State.

---

---

Ex Parte, G. D. Powell—Opinion of Court.

---

---

The other grounds of alleged error are not important.

The judgment remanding the petitioner must be reversed, and it is ordered that he be forthwith discharged from the warrant under which he was arrested.

After the rendition of the above judgment the Governor, July 2, 1884, made an order revoking the above warrant, and issued a new warrant on the original requisition from the Governor of Georgia and copy of affidavit accompanying it. Powell was arrested on this warrant in Alachua county where he had been incarcerated. He instituted proceeding by *habeas corpus* for his discharge from this arrest, but the Judge of the Fifth Circuit refused to discharge him, and Powell sued out a writ of error.

The other facts are stated in the opinion.

*A. L. Hawes* for Plaintiff in Error.

*The Attorney-General* for the State.

THE CHIEF-JUSTICE delivered the opinion of the court.

Powell obtained a writ of *habeas corpus* from His Honor Judge King, in Alachua county, to be discharged from the custody of the sheriff of that county on the ground that his imprisonment was illegal.

The sheriff made return that he held the said Powell by virtue of a warrant of the Governor of Florida issued July 1884, under the great seal of the State, upon a requisition of the Governor of Georgia demanding the delivery of Powell as a fugitive from justice, Powell having been charged before a magistrate of Georgia with a crime and having fled from that State to Florida.

There was produced before the Circuit Judge at the hearing a copy of a mandate of the Supreme Court recit-

---

---

Ex Parte, G. D. Powell—Opinion of Court.

---

---

ing that a judgment of the Circuit Court of Levy county rendered 24th June, 1884, in the matter of G. D. Powell petitioner, for a writ of *habeas corpus*, remanding him to custody, was reversed and set aside and the petitioner was discharged from the warrant under which he was arrested. There was also produced before the Circuit Judge a paper executed by the Governor of Florida, revoking a warrant issued by him on the 17th of March, 1884, for the arrest of G. D. Powell, on the requisition of the Governor of Georgia.

On hearing the cause the judgment was rendered that the petitioner be remanded to the custody of the sheriff of Alachua county, and that his discharge be refused.

This judgment is now brought up by writ of error. A reversal of the judgment is prayed upon the ground that "the appellant, G. D. Powell, was arrested and is held in custody by the sheriff of Alachua county upon a warrant for the same offence, issued upon the same affidavit without the order or judgment of any court of competent jurisdiction, after having been once discharged from confinement upon a former writ of *habeas corpus*."

And "because the Governor of Florida had no legal authority to revoke his former warrant and issue another for the same offence upon the same affidavit."

The cause was argued upon these assigned errors without reading the whole record.

Upon examining the record we do not find that there was presented to the Circuit Judge any evidence whatever that Powell had previously been arrested upon a warrant of the Governor of this State and discharged therefrom. A mandate of this court is copied into the record, showing that a judgment of the Circuit Court for Levy county remanding Powell to the sheriff of that county had been reversed and directing that he be released from custody, in a cause



---

---

New Orleans Insurance Association v. Boniel—Syllabus.

---

---

brought here by writ of error to the judgment of that court remanding him to the custody of the sheriff.

What was the cause of the imprisonment from which he was thereby discharged, does not appear in this record of proceedings before the Circuit Court, brought up by this writ of error. What facts appear of record in another case cannot be assumed, but should be proved by the record.

There is therefore nothing before us showing facts or questions of law arising in the cause upon which the errors here assigned can be grounded. It was not shown to the Circuit Court that Powell had been previously arrested by a warrant of the Governor, nor for what cause he had been arrested and from which arrest he was discharged by the judgment of this court. The warrant under which he is now held bears date July 2, 1884, a day subsequent to the former proceeding, and appears to be in due form of law.

There is no error apparent in the proceedings and judgment sought to be reversed by the present writ, and the judgment must be affirmed.

---

THE NEW ORLEANS INSURANCE ASSOCIATION, APPELLANT,  
vs. M. A. BONIEL, APPELLEE.

Plaintiff procured a policy of insurance in defendant association, through an employee of an agent, and after it expired applied for a renewal, but declined to pay the premium and take the renewed policy, and it was cancelled. He afterwards requested the same employee of the same agent to insure his property, and paid part of the premium, but did not specify in what company he desired to be insured, the same agent being the agent of several companies and no policy was issued. After destruction of the property by fire he paid the employee the balance of the premium, but the agent returned the money, declining to issue a pol-

---

---

New Orleans Insurance Association v. Boniel—Statement of Case.

---

---

icy. Defendant had no knowledge that the employee had any thing to do with their business. Upon these facts, the plaintiff had no contract for insurance in defendant association.

Appeal from the Circuit Court for Escambia county.

Boniel, plaintiff below, sued the appellant upon a contract of insurance made by plaintiff with appellant, through one Bell, its agent at Warrington. The following are the material facts appearing in record:

Prior to and at the date of the fire out of which this suit arose T. C. Watson was the agent at Pensacola of several insurance companies of which appellant was one. He then had, and for several years previous had had in his employ at Warrington, Fla., one Gam. Bell, whose duty it was to receive applications at Warrington for insurance in the companies represented by Watson, to forward them to Watson at Pensacola, deliver to the insured the policies when issued, and receive the premium and transmit it, less his commission, to Watson.

On January 19th, 1882, Boniel applied to Bell for insurance to the amount of \$300.00 on his furniture, clothing, &c., in his dwelling, and \$200.00 on his stock in his store in Warrington, and a few days thereafter received his policy in the New Orleans Insurance Association, and paid his premium to Bell. At the expiration of that policy, July 19th, 1882, Boniel applied to Bell for its renewal. Bell, a few days after, tendered him the renewed policy, but Boniel being unable to pay the premium at the time, asked Bell to hold the policy for him for awhile, which Bell did; Boniel continuing to fail to pay the premium, Bell finally returned the policy to Watson, some time in August.

On September 29th, 1882, Boniel again applied to Bell for insurance to the amount of \$300.00 on his clothing,

---

**New Orleans Insurance Association v. Boniel—Statement of Case.**

---

furniture, &c., in his dwelling, and \$300.00 on his stock in his saloon.

It seems that no mention was made by either, of the company which was to issue the policy. It was agreed between them that the premium should be \$18.00, and of that sum Boniel then and there paid Bell \$5.00, the latter agreeing to wait on him for the balance, and giving to him Boniel, a receipt for \$9.00 in the following words and figures, to wit:

WARRINGTON, FLA., Sept. 29th, 1882.

Received of M. A. Boniel nine dollars on account of insurance applied for this day.

\$9.00.

For T. C. WATSON,

Per G. BELL.

On October 3d Boniel paid Bell \$4 more on account of the premium.

October 6th a fire occurred at Warrington, which destroyed Boniel's dwelling, with his clothing, furniture, &c., the value of the latter being \$1,100, and on October 9th Boniel paid Bell \$9 more on the premium, making in all \$18 paid by him to Bell on account of the policy applied for September 29th, 1882. This money Bell forwarded to Watson, who refused to receive it or to issue the policy for which it was paid, and Boniel refusing to receive it back, Bell still holds it. Boniel made his proofs of loss, delivered them to Watson and demanded payment, which was refused by Watson and the New Orleans Insurance Association.

The court having charged the jury they returned a verdict for plaintiff for \$324 damages. A new trial was moved on the grounds that the verdict was unsupported by the evidence, that it was contrary to the charge of the court and contrary to law, and because of error in the charge.

---

---

New Orleans Insurance Association v. Boniel—Opinion of Court.

---

---

The motion having been denied, judgment was entered and defendant appealed.

*W. A. Blount* for Appellant.

*S. R. Mallory* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

There is no pretence that there is any testimony in the case showing that when plaintiff applied for the insurance *any* company was mentioned in which plaintiff desired to have his property insured. Watson was an agent for several fire insurance companies, and Bell, who seems to have been his employe in receiving applications for insurance and forwarding such applications to Watson for his action, and in delivering policies, when the applications were accepted by Watson, and collecting premiums thereon at Warrington for Watson, had no other agency in the matter. This general employment of Bell was not in reference to insurance in the defendant company alone but extended to several other companies for which Watson was the agent.

Bell never had any correspondence with defendant on its or his business, and it does not appear that the company had any knowledge of Bell's connection with Watson or with their business. There is no testimony in the case from which a legitimate inference can be drawn that plaintiff desired to insure his property in this company. The facts were simply that in January, 1882, he took out a policy for \$300 on his property in a house at Warrington and \$200 on stock of wine, &c., which expired in July. In August he desired to renew it and a policy issued by defendant was tendered him, but as he failed to pay the premium it was returned to Watson and cancelled. Afterwards in the latter part of September he "applied to Mr. Bell for insurance to the

---

---

Jeffreys & Stribling v. Greeley—Syllabus.

---

---

ount of \$600; \$300 on my furniure, wearing apparel, , in my dwellinfi house, (afterwards burned) and \$300 on stock in my saloon." The property was not in the same use it was in when the first policy was taken out. And the conditions being changed the amount of insurance ired being different, and no company being designated, re is no ground for the presumption that this company l entered into any contract to insure the property from : circumstances that they had before that issued a policy him which had expired and which he manifestly declined renew. In view of this conclusion it is unnecessary to sider other questions. The verdict was against the evi- ice and was not warranted by the charge of the court. Reversed and new trial granted.

---

FFREYS & STRIBLING, APPELLANTS, VS. J. C. GREELEY,  
APPELLEE.

an action of replevin, on the trial and before instructing the jury, the court asked the plaintiff to elect whether he would atke the prop- erty or its value in case he should have a verdict, and plaintiff elected to take the value, the property having been redelivered to the defendants. Thereupon the court charged the jury that if they found for the plaintiff they should "assess the damages at whatever sum may have been proven as the value" of the prop- erty, and the jury found for the plaintiff and "assessed the *dam- ages*" at a sum warranted by the proof of the value. Judgment having been entered for the amount of damages so found, de- fendants moved to vacate the judgment on the ground that the verdict should have assessed the *value* of the property and not *damages*, which motion was denied. On appeal it is held that the finding of the sum as "damages" was, under the circumstances and the charge of the court, a finding of the "value of the prop- erty," and the plaintiff electing to take judgment for the value

---

 Jeffreys & Stribling v. Greeley—Argument of Counsel.
 

---

was entitled to his judgment for the amount so found by the jury, and there is no substantial error in the judgment.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

*John T. & Geo. U. Walker* for Appellants.

This was an action of replevin under the statutory provisions collected on pages 300-3, McClellan's Digest, in which the appellee, who was the plaintiff in the Circuit Court, obtained judgment.

The declaration is in form to recover certain specific articles of personal property therein described; the plea was, "not guilty."

The only testimony as to the particular point made in this appeal was given by the plaintiff himself, and was as follows: In answer to his attorney's question, as to the value of the property, he said: "I have been offered \$175 for it; I believe it is worth that sum, and would take \$185 for it." On being cross-examined he said he could not give the market value of said property (furniture) in any other way than he had already done.

The verdict is in the following form: "We, the jury, find the defendants guilty, and assess the damages at one hundred and seventy-five dollars. December 3d, 1883. W. M. Bostwick, Foreman."

The judgment which the plaintiff selected to have entered in the exercise of his statutory right to elect is in the following words: "December 3d, 1883. \* \* \* \* \* Whereupon it is considered and adjudged that the plaintiff have and recover of and from the defendants one hundred and seventy-five dollars, besides his costs in this behalf expended now here taxed at"—.

The defendants moved to vacate the judgment on the grounds stated in their motion, and this was denied. It is

---

---

Jeffreys & Stribling v. Greeley—Argument of Counsel.

---

---

from the refusal of the court to vacate said judgment we appeal.

We contend that under the law, (see sec. 17, pages 862-3, of McClellan's Digest,) the plaintiff could not take judgment for damages as was done. In this case, after seizure of the property for plaintiff, it was redelivered to defendants, they giving bond, and the plaintiff maintained his suit on the trial. See McClellan's Digest, *supra*.

The only testimony as to value was that of the plaintiff already quoted. The court gave the jury a charge at defendants' request, which is undoubtedly the law in regard to what alone must be considered value.

The jury found for the plaintiff and assessed damages. We hold this verdict to be in its legal effect a finding that plaintiff recover the property, *and this alone*. Any *other construction* makes it *meaningless*. The basis of recovery of damages must either be the value of the property, that is its *market value*, or some proof to show injury to the plaintiff from being deprived of the use and enjoyment of his property while defendants detained it. Of the latter, there was no *pretense* of proof; as to market value, we contend that what the plaintiff testified did not prove it.

The jury did not say by their verdict "We find that the property is plaintiff's, and that the value is ——— dollars." But if they had any such idea and meant to convey it in their verdict, then they went squarely and flatly against the Judge's charge. But we cannot conceive that they *wantonly disregarded* it. They took the charge, looked at the evidence, and finding no proof whatsoever of market value, and being instructed that they could not find value unless market value was proved, and that what plaintiff had been offered or was willing to take was not evidence of market value, this being the sole proof before them on that point, we are compelled to conclude that the jury

---

---

Jeffreys & Stribling v. Greeley—Opinion of Court.

---

---

meant by assessing *damages* in their verdict that they had reference to the notion of the plaintiff having suffered pecuniary loss from being deprived of his property during the period of its detention. For the purposes of this discussion it is immaterial whether there *was* or *was not* proof of any such loss, the only right the plaintiff had was at his option on a verdict in his favor to take judgment for "the value of the property" or "for the property itself." We admit his right to take the latter judgment. To this the plaintiff must be confined. It is impossible to have judgment for *damages* as such; the statute excludes it. The plaintiff preferred money to the property, hence his choice. But he cannot take money except for the value of the property. There was not and could not have been any verdict for value under the charge and evidence. There was no verdict for value. The verdict can be construed to have no legal effect save that plaintiff recover the property. For this and nothing else can he take judgment, and to this the defendants are willing.

*R. B. Archibald* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

Greeley sued appellants in replevin for a set of parlor furniture, alleging its unlawful detention by them. They gave bond under the statute and the property was returned to them by the sheriff.

Defendants pleaded not guilty and the cause was tried with a jury. Plaintiff testified that he had purchased and owned the property. He said in answer to his attorney's question, "I have been offered one hundred and seventy-five dollars for it. I believe it is worth that sum and would take one hundred and eighty-five for it." On cross examination, he said he could not give the market value of the



---

---

**Jeffreys & Stribling v. Greeley—Opinion of Court.**

---

---

furniture in any other way than he had already done.

Other testimony was given, but the foregoing is all that is necessary to present the legal questions raised.

Before charging the jury the court called on plaintiff's attorney to elect whether he would take the furniture or the value of it in case of a verdict for plaintiff, and plaintiff's counsel announced in open court that he elected to take the value.

The judge then charged the jury as follows: "If the jury believe from the evidence that the furniture in question is the property of the plaintiff and is unlawfully detained by the defendants, you should find a verdict of unlawful detention." And further: "If the jury find for the plaintiff, they should assess the damages at whatever sum may have been proven as the value of the furniture." Exceptions were taken to each paragraph.

At the request of defendants the judge charged the jury: "Before the jury can assess any value for the property they must find from the evidence the market value thereof. What the defendant may have been willing to take, or what any particular individual may have offered him, is no evidence of market value."

The jury found for the plaintiff and "assessed the damages at one hundred and seventy-five dollars." Judgment was entered on verdict. Defendants moved to vacate the judgment on the ground that the verdict is for damages and not for the value of the property; whereas the statute provides that the plaintiff shall take judgment for the "value of the property" or "for the property itself." The motion was overruled. Defendants appeal and assign for error the refusal of the court to vacate the judgment.

Appellants insist that the verdict and judgment are not authorized by the statute.

It is provided that "on the trial of any action of replevin

---

---

Jeffreys & Stribling v. Greeley—Opinion of Court.

---

---

when the property has been re-delivered to the defendant, the same proceedings shall be had as provided by law, except that when the plaintiff in replevin shall maintain his suit it shall be at his option to take judgment for the value of the property and sue out execution therefor, or take judgment for the property itself," &c. McC. Dig., 862, §17; Acts of 1879, ch. 3133.

His argument is that the verdict should have been for plaintiff, and assessing the value of the property. That this form of verdict would be strictly correct is very evident. What the form should be is not prescribed by law, but the statute says "when the plaintiff shall maintain his suit, it shall be at the option to take judgment for the value," or for the property itself. The option may be exercised when he "shall maintain his suit." He took his judgment for the money, and so exercised his option after verdict.

The option is that of the plaintiff and not that of the defendants, and so it is of no consequence to the defendants whether plaintiff expressed his opinion before or after verdict. In fact, if the verdict had been \$25 instead of \$175, the advantage, if any, would have been on the side of defendants.

In this case, according to the bill of exceptions, before charging the jury the judge asked the plaintiff to express his opinion, to which the defendants did not object, and the plaintiff in open court announced his election to take the value, and to this the defendants did not object or except, but thereby acquiesced.

The judge then charged the jury that if they should find for the plaintiff they should assess the *damages* at what was proven to be the *value* of the property, and they assessed the "damages" at \$175. The testimony, which was not objected to or excepted to in any manner, named

---

---

Jeffreys & Stribling v. Greeley—Opinion of Court.

---

---

\$175 as the value, and this was the only sum named. So it is evident that the damages so assessed was what they found proven as the value. To say, then, that the jury should have used the word value instead of damages, is in this case a play upon words and did not affect the rights of the parties. The defendants are not injured by the supposed irregularity in the choice of words.

Nor could the jury have been misled by the instruction of the court to assess the damages at the value as proven; it was the value that they were instructed to find, and it was immaterial whether it was called damages or value in reporting the amount found proved. Suppose the plaintiff had not made his election until after this verdict was returned, in which, under the instruction of the court, they had ascertained the value and called it damages? In that case how could it have been erroneous to have allowed the plaintiff to take his option of a judgment for the property, or for the amount so found? Appellants confess that if it had been designated as value the plaintiff could have his judgment for the amount. There is no room for question that the amount named did not include anything beyond what they were authorized by the evidence to find as the value of the property. There is no question raised as to the sufficiency of the evidence, and, indeed, as there was no exception to the testimony and no motion for a new trial, no such question can be considered. Nor is there any question before us as to the correctness of the Judge's charge. The motion here was, after judgment, to vacate it, not to set aside the verdict.

For the reasons before stated we cannot discover how the supposed irregularity complained of could have operated to the disadvantage of the defendants.

The judgment is affirmed.

---

Walter v. The Florida Savings Bank, etc.—Opinion of Court.

---

PHILIP WALTER, APPELLANT, VS. THE FLORIDA SAVINGS  
BANK AND REAL ESTATE EXCHANGE, APPELLEE.

1. When in an action upon a contract the defendant pleads ~~that~~ he "did not promise as alleged," and also pleads specially ~~that~~ the plaintiff contracted with him as an agent of another and not otherwise, and that plaintiff knew this fact at the time of contracting, such special plea is only a repetition of the general plea that the defendant did not promise as alleged.
2. The overruling of plaintiff's demurrer to such special pleas may, therefore, have been erroneous, but such ruling did not change the issues or affect the legal rights of the parties. Such pleas only encumbered the record.
3. Where upon the trial of such cause a verdict is found for the defendant, but upon appeal the record does not show the testimony nor the rulings of the court thereon, nor the charge of the court to the jury, nor any exceptions, this court cannot reverse the judgment on account of the overruling of the demurrer to the pleas, as it does not appear whether the court admitted improper testimony in behalf of defendants, nor indeed that the plaintiff introduced any testimony in the case to support the declaration.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

*A. W. Cockrell, Jno. T. & Geo. U. Walker* for Appellant.

*R. B. Archibald* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

Appellant sued defendant for damages on contract whereby it is alleged the defendant agreed to deliver to plaintiff certain certificates of value. A part of the contract set out in one of the counts was in writing, embodied in a receipt for a part of the purchase price. Defendant pleaded to each count in the declaration that it did not promise as alleged, and also pleaded specially that the agreement sued on was

---

**Walter v. The Florida Savings Bank, etc.—Opinion of Court.**

---

not its contract but was the contract of one Huling, for whom it was acting as an agent, of which plaintiff had notice.

Plaintiff demurred to each of the special pleas, and the demurrers being overruled, joined issue on the pleas. On the third trial of the cause a verdict was rendered in favor of defendant. A motion for a new trial was made and denied and judgment entered against the plaintiff. From this judgment plaintiff appeals.

The errors assigned are the overruling of the demurrers to the pleas.

There is none of the testimony at the trial contained in the record. Every material fact alleged in the declaration, except the signing of the receipt containing a portion of the agreement, was put in issue by the pleas denying the contract as alleged. On the pleadings alone the plaintiff was not entitled to verdict and judgment. He must prove his case, and show what damages he sustained.

Nor is the charge of the Judge to the jury before us, nor is there anything here showing exceptions to any proceeding at the trial whereby an error is patent. The motion for a new trial was made upon the grounds that the verdict was against the evidence and against the charge of the court, but we have neither the evidence nor the charge.

We have no means of knowing that the plaintiff offered any testimony whatever at the trial. How then can we determine that the court erred in refusing a new trial?

But the argument is advanced that the court improperly overruled plaintiff's demurrers to the special pleas, whereby the court erroneously ruled that the matter of these special pleas constituted grounds of defence to the plaintiff's action. However erroneous may have been this ruling upon the pleas we still cannot conceive how the verdict was affected, or we have no evidence that the court heard any testimony

---

---

Pendry v. Wright et als.—Statement of Case.

---

---

under them. Indeed, in examining these pleas we are unable to see that they amount to anything more than a denial that defendant made the alleged contract. Any testimony contemplated by the pleas could, therefore, as well have been given under the general issue as under the special pleas. The issue was whether the contract was that of the defendant or whether it was the contract of Huling. Whether the facts set out in these special pleas could have been shown to defeat the right of action under the one count which alleged that the contract was in writing, and thus to vary the terms of the writing, is not a question presented by the record, for we do not know whether any, or what testimony was offered by either party.

It does not appear, therefore, that any error was committed which substantially affected the rights of the plaintiff, and the judgment must be affirmed.

---

A. S. PENDRY, APPELLANT, VS. A. D. WRIGHT ET ALS.,  
APPELLEES.

A bill in equity filed to settle boundary lines between adjoining owners of land, no "confusion of boundaries" being involved, but only a dispute as to the location of the true boundary, it being a section line established by the United States surveys, presents only a naked question of title of which a court of chancery has no jurisdiction. The alleged fraudulent conduct of defendant in attempting to establish a line other than the true line which he has heretofore acknowledged, does not give equity jurisdiction.

Appeal from Circuit Court for Orange county.

Wright and others, respondents here, brought their bill against appellant, alleging that they are the owners of a tract of land described according to government surveys as the west half of the northeast quarter, and the east half of

---

---

Pendry v. Wright et als.—Statement of Case.

---

---

the northwest quarter of section 14, township 19, south range 26, east, containing 160 44-100 acres; that the land was conveyed by one Wylly to Doane in September, 1880; that complainants went into possession peaceably at the time the land was so conveyed and have so remained in possession ever since that time, and the appellant has not been in possession, he having surrendered possession of the portion now claimed by him to George W. Wylly, who conveyed to Doane. That appellant has in divers ways admitted and recognized the north line of the land occupied by them as the true and correct line, according to the survey made by the authority of the U. S. government, of the land so conveyed by Wylly to Doane, and that said north line is the correct line; that some eighteen or twenty rods south of that line there appears a line of marked trees across sections 13 and 14, which line of marked trees appellant now claims is the correct northerly line of complainant's land and claims to own the same down to said marked line; that he procured a survey to be made by the County Surveyor, whereby the line between the terminal points of said line of marked trees at the east and west of complainants' land was found and declared by the Surveyor and by himself to be the line of the government survey between said section 14 and section 11, and that appellant falsely pretended to have found at one of said terminal points a post which had been set by the government surveyors to mark the section corners, and he caused the said corner post to be set and erected as the true corner from which the east and west line should be run to designate the northern boundary of said section 14 and of said complainants' land, all which conduct with other actings and doings of appellant, were fraudulent and designed by him to defraud complainants and to obtain a portion of their land; "Wherefore, (the bill reads,) the said A. S. Pendry per-

---

---

Pendry v. Wright et als.—Argument of Counsel.

---

---

sists in laying claim to the tract of land lying between the fraudulent survey and the true line and threatened to take possession of the same by virtue of the so-called survey made by the said Robinson, (County Surveyor,) against the rights of your orators in the premises, and to the extinguishment of their title and interest in said tract of land." This is the substance of the allegations.

The bill prays that appellant be restrained from taking possession or attempting to take possession, or in any way disturbing his quiet and peaceable possession of the said tract of about eighteen rods wide as surveyed by the County Surveyor, and from disposing or in anywise attempting to alienate, or encumber the same, and that the court declare the boundary line so as to accord with the field notes of the survey made by the United States.

An injunction was allowed. Appellant answered. Exceptions to the answer were filed, some of which were allowed, and further answer required to be filed. Pendry appeals from all the orders of the court on the ground that the court of chancery has no jurisdiction of the matters complained of in the bill.

*John W. Price* for Appellant.

*Alex. St.-Clair Abrams* for Appellees.

The bill in question does not allege a confession of boundaries as set forth by appellant. It sets up a determination of boundaries, and the appellant's assent thereto, and his subsequent attempt to disturb the possession of the appellee.

The bill clearly sets up an equity in the complainant. He was in possession, and the boundary had been fixed and agreed upon between the defendant and his (complainant's) vendor. The attempted repudiation of this agreed



---

---

Pendry v. Wright et als.—Argument of Counsel.

---

---

upon boundary, years after complainant had been in possession, was a fraud upon complainant and called for the interposition of a court of equity. A “particular circumstance of fraud” is set up in the bill in the attempted encroachment by the defendant upon the complainant.

If the confusion of boundaries has been occasioned not by the negligence of both, but by the fraud of one of the parties when, for instance, he has been gradually encroaching \* \* a court of equity will interfere. *Leading Cases in Equity*, Vol. 2, Part 1, 856.

But this is really not a case in which any confusion of boundaries is set up in the bill. On the contrary, the bill distinctly sets up that the boundaries had been and were clearly defined and agreed upon, and that the complainant went into peaceable possession under their vendor, George W. Wylly, with the defendant's knowledge and assent, but that the defendant is attempting to confuse the boundaries by a subsequent fraudulent survey and by threats to take possession of the strip of land, the ownership of which in the complainants had already been recognized by the defendant. On such a statement of facts equity will intervene to prevent the perpetration of the threatened wrong.

The boundary having already been agreed upon and complainants having purchased and taken possession without notice of any adverse claim, equity will protect them against any menace of defendant. Equity will interfere where the power is necessarily exercised incidentally in furtherance of another equity, (*Perry vs. Pratt*, 31 Conn., 133,) and the equity of complainants out of the defendant's original agreement as to the boundary with the complainants' vendor.

As shown by the bill the defendant has not only menaced the complainants' possession by a fraudulent claim of ownership over a large tract of land in complainants, but he

---

---

Pendry v. Wright et als.—Opinion of Court.

---

---

has gone to the extent of committing a trespass on the land by having a new boundary line surveyed and asserting ownership over the tract lying between the fraudulent line and the boundary agreed upon. Unless the defendant is enjoined from further proceedings of the kind he is guilty of a wrong or spoliation which precludes the possession or enjoyment of a right. It puts it in his power to destroy or obliterate the true boundary and deposes complainant of the enjoyment of his rights of quiet and peaceable possession. *Merryman vs. Russell*, 2 Jones' Eq., 470; *White & Tudor*, *Leading Cases in Equity*, Vol. 2, Part 1, 864.

Equity will take jurisdiction in all cases in which the law does not afford a full, complete and adequate remedy. In some of the States by statutory enactment an adverse claimant to land not in possession may be forced by the party in possession to disclose the nature of his claim and thus settle the question of title. There being no statute of the kind in this State, the equitable interposition of the court becomes necessary to protect persons exposed to wrong and injury and loss by just such fraudulent claims as are set up by defendant, and relief from which is sought by the bill.

THE CHIEF-JUSTICE delivered the opinion of the court.

There is certainly no ground for the interposition of equitable jurisdiction in this case. The complaint is that plaintiffs are the owners of certain lands, the northern boundary of which has been recognized by appellant, and they occupy the land to this boundary, which they allege is the northern line of the section; and that this line corresponds to the lines of the adjacent sections as they were established by the surveyors under the authority of the United States Government. They charge that appellant now claims to own a portion of this land, to wit: about 18 rods

---

---

Pendry v. Wright et als.—Opinion of Court.

---

---

wide; that he claims the line established by the United States instead of being on the northern boundary of the premises occupied by complainants is 18 or 20 rods south, and that he has induced a county surveyor to run this more southerly line and declare it to be the true boundary line, and has pretended to find a decayed post which he pretends is the original corner post, and pretends that it was found where it was originally set by the United States surveyor to mark the corner of the section; all which actings and pretences were falsely and fraudulently devised and contrived as a basis of a claim to the ownership of a part of complainants' land which appellant threatens to take possession of.

As complainants have suggested in their brief, this is not a case of "confusion of boundaries," but a menace of complainants' rights by appellant. The boundaries of the section are defined upon the minutes of surveys in the United States Land Office, and they cannot be affected by the alleged fraudulent conduct of appellant. The real controversy is over the true location of the line, and whether appellant is estopped by matter *in pais* to claim any portion of the land occupied by complainants, even if the government surveys do locate the section line further south. In other words, it is a claim of ownership of land by both parties, the true boundaries whereof are matters of fact equally accessible to them, and the title and right of possession are cognizable in a court of law and not a court of equity. It is a naked question of title of which a court of equity has no jurisdiction. *Doggett vs. Hart*, 5 Fla., 215; *Wake vs. Conyers*, 1 Eden, 331, with English and American Notes in 2 White & Tudor's L. Cas. in Eq., Part I, 850 to 864; 1 Story's Eq. Jur., 7th Ed., §§615, 622; Pomeroy's Eq. Jur., §§1384, 1385.

The decree is reversed and the bill must be dismissed.

---

---

Dubois v. Holmes—Argument of Counsel.

---

---

LOUIS DUBOIS, APPELLANT, v. AMOS HOLMES, APPELLEE.

In ejectment it is incumbent on the plaintiff claiming under deeds to show proper conveyance from a party having title or prior possession, in order to put a defendant in possession to proof of his right.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

*Jno. T. & Geo. U. Walker* for Appellant. .

The judgment must be reversed on the familiar principles that the plaintiff must recover on the strength of his own title.

The defendant was in possession. The plaintiff sued him and introduced two deeds from different grantors to the plaintiff. The description in these deeds it is presumed (we never cared to ascertain) embraces the *locus in quo*; but what right or interest either of these grantors had to convey nowhere appears.

Begging the pardon of the court for citing to it any authority in so plain a case, we refer to *Doe ex dem. Magruder and Logan vs. Roe*, 13 Fla., 602; *Hartley vs. Ferrell*, 9 Fla., 374; *Jones vs. Lofton*, 16 Ib., 139.

The appellant asked the court to charge "if the jury believe the evidence they will find for the defendant." We call the attention of this court to that charge because there seems to be a very general impression that such a charge would be, in any case, one like this for instance, where there is no conflict in the testimony—a violation of the provisions of chapter 2096, McClellan's Digest, 338, §34.

But manifestly such a charge in a case where there is no dispute as to the facts, is "only upon the law of the case."

There is no fact to be found by the jury. If they believe

---

---

Dubois v. Holmes—Argument of Counsel.

---

---

the undisputed evidence *the law* is for one side or the other, and we submit that it is the duty of the court, where properly requested, to say for which. *Bevan vs. U. S.*, 13 Wall., 56; *Hendricks vs. Lindsay*, 93 U. S., 103.

*C. P. & J. C. Cooper* for Appellees.

This is an appeal from the Circuit Court for Duval county.

This case was an action of ejectment brought by Amos Holmes, plaintiff in court below, to recover certain premises from Louis Dubois, defendant below.

On the trial in the Circuit Court, Holmes, plaintiff below, established the *legal title* in himself by introducing two deeds to him of the premises in controversy, one from J. J. Daniel and one from Thomas Coskery, and duly proving their execution. The defendant below had by his plea of "not guilty" admitted possession of the larger part of the premises so that it did not devolve on plaintiff below to prove that fact.

The defendant in the Circuit Court put in no testimony of any kind to support his issue of title. On this condition of the case, the court charged the jury, that if they found from the evidence that plaintiff had shown title by deeds, duly executed and proven, to himself of the premises in question, and defendant had shown no title, plaintiff was entitled to recover.

On this charge and refusal to give defendant's charges, the jury found for plaintiff below, and defendant, Louis Dubois, took his appeal and brings this case here.

The matter raised by this appeal for this court to decide is what is necessary in Florida to be proven to recover in ejectment, or to put defendant to proof of his title. We contend that when the plaintiff in ejectment has proven a *legal title* in himself to the premises involved, such plaintiff

---

---

Dubois v. Holmes—Argument of Counsel

---

---

or his ancestors or grantors are presumed to have been possessed thereof within seven years, and the occupation of defendant not showing any title is deemed to be in subordination to the legal title, to wit: of plaintiff. This is the statute of the State of Florida as we understand it, and no matter what may be the rule as to proof title elsewhere establishing a *legal title* is sufficient in this State. We ask this court's careful consideration of our statute on this point. See McC. Dig., p. 731, sec. 4.

The language of section and explanatory note on margin is plain, "possession is presumed from legal title." Defendant below insisted there and insists here, that plaintiff must prove more than legal title, to wit: right of entry, by showing plaintiff's or his grantor's former possession. We contend under this statute our former possession and consequent right of entry is presumed when we prove legal title, unless defendant proves the contrary. The clear intention of this statute is to put defendant to showing under what claim he holds as against the legal title.

This statute was passed subsequent to the case of *Doe ex dem. Magruder vs. Roe, &c.*, 13th Florida, 607. That is the only case in this State touching this subject in question, and there this court only decides in effect that right of possession does not *so absolutely* follow legal title as to preclude defendant from showing his title and right of possession which the court below did in that case. In this case at bar defendant did not undertake to show anything. But as we have said, the statute above referred to, passed in February 27, A. D. 1872, chapter 1869, settles this point.

It has been decided in many cases that title and seisin are always considered to be united until disseisin is shown and a conveyance is not presumed in favor of a defendant to defeat the claim of a party showing good paper title unless defendant *shows some rightful claim to his possession*. See

---

---

Dubois v. Holmes—Opinion of Court.

---

---

3 Wendell, 149; 8 East's Rep., 263; 2 Wend., 14, 35 and 38; 11 East, 372; Angel's Limitations, secs. 384, 385; 7 Wheat., 59, and other cases cited to these sections.

In cases of these State lands, acquired of the Trustees of Internal Improvement Fund, as plaintiff's deeds recite his are, it is decided in many States from the nature of the lands the courts consider possession as following ownership. 14 Johns., N. Y., 405; Ibid, 262.

And in South Carolina a statute similar to ours, that possession is deemed to be in him who has legal title, is explained and upheld. 2 Bailey Rep., 101.

We think an examination into the history of the action of ejectment shows, that first it was an action for damages by tenant in possession for trespass, then right of possession was attached, then by legal fiction parties contested title through fictitious lessees and evictions; now in our State all the English fiction, as to entry and ouster, in order to test title in ejectment, having been abolished, it seems to us unnecessary in the first instance for plaintiff to show any former entry or possession in their grantor, if defendant can show that plaintiff's grantor *was not in possession* when plaintiff's deed was made, then that would defeat plaintiff's title; but in this State ejectment settles title and former entry or showing of possession is unnecessary in first instance by plaintiff.

THE CHIEF-JUSTICE delivered the opinion of the court.

Ejectment brought by Holmes against appellant for two parcels of land in Duval county. Plea, not guilty.

Plaintiff introduced in evidence a deed to himself executed by Thomas Coskery in 1879, and a deed by J. J. Daniel to plaintiff in 1881, conveying the respective parcels. These deeds comprised the whole evidence.

The court charged the jury that if it found that Coskery

---

---

Dubois v. Holmes—Opinion of Court.

---

---

and Daniel conveyed by deeds duly executed the land sued for and that defendant has shown no legal title or right of possession their verdict should be for the plaintiff. Defendant excepted.

Defendant's counsel asked the court to instruct the jury that unless they find from the testimony some other source of title or right of possession than is afforded by the deeds of Coskery and of Daniel they should find for defendant. The court refused so to charge and exception was taken.

Verdict for plaintiff and judgment thereon from which defendant appealed.

It is incumbent on the plaintiff in ejectment to prove proper conveyances from a party having the title. If the conveyance is from a party in peaceable possession claiming title at the time it was executed, that is sufficient for that is *prima facie* evidence of truth. Tyler on Ejectment, 541. The production of a deed of conveyance, upon the trial of an action of ejectment, will not entitle a plaintiff to a verdict when the title is in dispute. Nor will such evidence put the adverse party upon his defence. He must show in addition, either that his grantor and those under whom he claims had the title or possession claiming title. *Dominy vs. Miller*, 33 Barbour, 386; *Stevens vs. Hauser*, 39 N. Y., 302. In the absence of a regular documentary title there should have been introduced at least presumptive evidence by showing some possession, or other fact such as is allowed by the common law to make out a *prima facie* case of ownership. The giving of a deed is no evidence of title in the grantor. *Smith vs. Lawrence*, 12 Mich., 431.

This is believed to be the rule everywhere except in Massachusetts. *Artemas Ward vs. Fuller*, 15 Pick., 185; *Higbee vs. Rice*, 5 Mass., 352. But there the rule is founded upon the phraseology of the statute.

Here we have no evidence that plaintiff's grantor ever



---

---

Smith, alias Cox, v. The State—Opinion of Court.

---

---

had title or possession. It is not a case of vacant or unoccupied land for the defendant is in possession, and the plaintiff must show a superior right in himself or his grantors.

It is claimed here that Coskery and Daniel have a title because they have executed a deed. Plaintiff claims under their title but no possession in them is shown.

The judgment is reversed and the court below will set aside the verdict and grant a new trial.

---

EDDIE SMITH, (ALIAS EDDIE COX,) PLAINTIFF IN ERROR, VS.  
THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. The Laws of the State and the rules governing the Circuit Courts of the State provide the manner and time of making up and filing a bill of exceptions, so that it becomes a part of the record brought up by writ of error.
2. Unless the law and the rules governing the court are complied with, the bill of exceptions is a nullity and cannot be considered in this court.

Writ of Error to the Circuit Court for Leon county.

The facts of the case are stated in the opinion.

*John S. Beard* for Plaintiff in Error.

*The Attorney-General* for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

At the December term of the Circuit Court held in and for the county of Leon, in the year 1883, the plaintiff in error, Eddie Smith, alias Eddie Cox, was indicted for the crime of murder. Having pleaded not guilty, he was tried at the same term of the court and found guilty. Counsel

---

---

Smith, alias Cox, v. The State—Opinion of Court.

---

---

for prisoner made a motion for a new trial, which motion was refused by the court, as appears by the minutes of the court in the record. Counsel for defendant subsequently procured a writ of error to this court. What is called a bill of exceptions is embodied in the record dated the tenth day of January, 1884, the court having adjourned *sine die* on the 24th day of December, 1883, and no order extending the time having been asked for or made. The certificate of the judge holding the court is in the following language: "The court does now sign and seal the foregoing as the bill of exceptions in said cause on this 10th January, 1884, when it is first presented, but cannot sign it as of the day when it should have been presented, to wit: on the 24th day of December, 1883, when the court adjourned *sine die*, because no application was made to the court before its final adjournment for any time to perfect an appeal or to prepare a bill of exceptions.

"Signed and sealed this January 10, 1884.

! [Seal]

"D. S. WALKER, Judge."

In the record there is no exception taken to any ruling of the court, signed by the Judge, which of itself would make a bill of exceptions.

The statute of this State in respect to the duty of the Judges of the Circuit Court in the matter of granting bills of exceptions, is as follows: "It shall be the duty of the Judges of the Circuit Courts of this State, upon the trial of any person or persons charged with crime or a misdemeanor in said court, to sign and seal, upon request, any bill of exceptions taken during the progress of the cause and tendered to the court, Provided," &c.

The ninety-seventh rule of Circuit Court Rules, provides as follows:

"The bill of exceptions shall be made up and signed during the term of the court, at which the verdict is rendered

---

---

Whitehead v. The State—Syllabus.

---

---

or trial had, unless by special order further time is allowed. In case such special order is made, it shall be entered in the minutes, and in making up the bill of exceptions the fact that such an order was made shall be mentioned therein, or shall otherwise appear in the record.”

In this case no bill of exceptions “was taken during the progress of the cause,” as provided by statute, nor was any order made under the rule by which “further time is allowed.” There is no exception properly taken in the record aside from the bill of exceptions, and there is no bill of exceptions as known to the law.

In the case of Price & Wife vs. Sanchez, 8 Fla., 136, this court decides that it would not reverse a case when the facts are not presented by a bill of exceptions, and this rule has been adhered to by this court continuously. Broward vs. State, 9 Fla., 422; Barden vs. L’Engle, 13 Fla., 571, 602; Potsdamer vs. State, 17 Fla., 895.

The judgment must be affirmed.

---

HILLIARD WHITEHEAD, PLAINTIFF IN ERROR, vs. THE  
STATE OF FLORIDA, DEFENDANT IN ERROR.

1. In the trial of an indictment for larceny it is always necessary to prove the value of the property alleged to have been stolen, in order to determine the grade of the offence and the penalty to be imposed.
2. When the bill of exceptions in such a case embraces the testimony and does not show the value of the property so charged to have been stolen, and this court cannot see that the proper verdict has been found, the court will award a new trial.

Writ of Error to the Circuit Court for Jackson county.

The facts of the case are stated in the opinion.

---

---

Whitehead v. The State—Opinion of Court.

---

---

*J. D. Thompson* for Plaintiff in Error.

*The Attorney-General* for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

In May, A. D. 1874, the grand jury of the county of Jackson indicted Hilliard Whitehead for larceny. He was tried at the May Circuit in the year 1883, the jury finding him guilty. Counsel for the defendant moved, in the first instance, to quash the indictment, which motion was denied by the court. They then moved for a new trial, which motion was also denied.

A writ of error was then procured and the cause brought to this court. The court sentenced the prisoner to pay a fine of two hundred dollars and the cases of the suit.

The statutes of the State provide that "whoever is convicted of stealing property not exceeding in value twenty dollars shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine of not more than one hundred dollars, or to be imprisoned in the county jail," &c. McC. Dig., 388, §1.

In case of larceny, when the value of the property does not exceed one hundred dollars, the penalty is "by imprisonment in the State penitentiary or county jail not exceeding one year, or by a fine not exceeding three hundred dollars." If the property stolen exceeds the value of one hundred dollars, the penalty is by "imprisonment in the State penitentiary not exceeding five years, or by a fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year." McC. Dig., 360, 317. The indictment alleges that the defendant "did steal, take and carry away fifteen pairs of shoes of the value of thirty dollars; two pairs of fine boots of the value of sixteen dol-

---

---

Wittich v. First National Bank of Pensacola—Syllabus.

---

---

urs; one piece of dress goods of the value of fifteen dollars; one suit of clothes of the value of twenty dollars.”

The bill of exceptions signed and sealed brings up the evidence taken on the trial, and we look in vain in that evidence for proof of the value of the goods so alleged to have been stolen, or any part or parcel of them. It is impossible to see how the jury determined that the value was greater than to constitute a misdemeanor.

The value of the goods so taken must appear in the evidence in order to determine the grade of the offence and the penalty to be imposed.

Judgment reversed and new trial ordered.

---

V. L. WITTICH, PLAINTIFF IN ERROR, vs. THE FIRST NATIONAL BANK OF PENSACOLA, DEFENDANT IN ERROR.

- . Due notice of the non-payment of a common bank check may be necessary for the protection of the holder, but a protest by a notary is not so; such protest will not charge the drawer with the fees of the notary.
- . W. drew his check on the M. bank where he had ample funds, in favor of the F. N. B., which being presented for payment at 11 o'clock was not paid, but M. bank informed payee it was good and would be paid at close of banking hours, which was the customary time for exchange of checks between them, whereupon payee at once caused the check to be protested by a Notary Public for non-payment. W. now sues payee for injury to his financial credit and reputation by unnecessarily causing the check to be protested. *Held*, on demurrer, that though protest was unnecessary, it was not a wrong to the drawer from which damage is presumed.

Writ of Error to the Circuit Court for Escambia county.

The facts of the case are stated in the opinion.

---

---

Wittich v. First National Bank of Pensacola—Argument of Counsel.

---

---

Wm. A. Blount for Plaintiff in Error.

The demurrer should have been overruled.

The check which was protested was a local check and was not protestable. Byles on Bills, 26, 474.

If it was not protestable, the defendant had no right to protest it. The act itself was necessarily injurious. Besides, plaintiff alleges special damage.

The doing of any act which one has no right to do and which results in damage to his neighbor, gives that neighbor a cause of action. The absence of right in the doer is always accompanied with a corresponding presence of right in the one to whom the act is done not to have it done. The right of the latter to the absence of action by the former is a legal right which is invaded by the act, and the invasion gives a right of action.

The right of protest is an outgrowth of the commercial law, and as such only, at first, applied to foreign bills of exchange. It was not intended as a punishment to the drawer or endorser for failure to accept or pay, but as a protection to the holder of the bill, by furnishing an internationally accepted means of proof of the notice, which the law required.

Subsequently the right was extended to inland bills of exchange, payable *after date*, and to promissory notes.

The court will take notice that the exercise of the right in the commercial world is always of great injury to the person whose paper is protested. It is *prima facie* an imputation of insolvency—a *prima facie* which cannot be removed, because it is impossible to bring an explanation of peculiar circumstances in any given case to all those who have heard of the protest.

Every man has a right to a reputation of solvency until he himself destroys it, and no other by an act unnecessary

---

---

Wittich v. First National Bank of Pensacola—Argument of Counsel.

---

---

to his own protection has a right to invade the sanctity of that reputation.

Here there was no requirement by the commercial law that protest should be made and in the absence of such requirement it was the right of the plaintiff not to have it made. No right being created by the common or commercial or statute law, and the act being injurious to another, the common law visits the action with the penalty of damages to that other.

The second count was stronger than the fourth and the demurrer to it should *a fortiori* have been overruled.

According to the facts presented by it the protest of this check was not only not allowed or necessary by the general law, but it was in violation of the custom of the banks of Pensacola set up in the court.

Usages like this are good. Renner vs. Bk. Columbia, 9 Wheat., Bk. Utica vs. Smith, 18 John., 230; Bk. Washington vs. Triplett, 1 Peters; Mills vs. Bk. U. S., 11 Wheat., 13 N. Y., 290; 70 Penn. St., 476; 4 Cal., 35; 4 B. & A., 752; Morse on Banks, 393; Wiseman vs. Chiapella, 23 How., U. S., 368.

But even if allowable it was unnecessary.

The check had no endorsers and the protest could serve the purpose of holding no one who would not be held without it.

Being unnecessary and being injurious to plaintiff, he has a right of action.

The maxim *sic utere*, etc., applies as well to the exercise of a right as to the use of tangible property, and the exercise which in one case may be with perfect impunity in another becomes actionable because injurious to one's neighbor.

See upon the right of action Cooley on Torts, §60; 1 Addison on Torts, 4 and 6 notes; 1 Smith's Leading Cases,

---

---

Wittich v. First National Bank of Pensacola—Opinion of Court.

---

---

478, 487; *Ashby vs. White*, 1 Smith L. C., 455; *Chapman vs. Pickersgill*, 2 Wil., 145; *Broom's Commentaries*, p. 660; *Pasley vs. Freeman*, 3 L. R., 63.

*John A. Henderson* for Defendant in Error.

THE CHIEF-JUSTICE delivered the opinion of the court.

The declaration in this case in one count alleges that the bank received for collection a draft on the plaintiff, Wittich, residing at Pensacola, who gave the bank his check on the Merchants' Bank of Pensacola, where he had ample funds. On the same day before noon defendant presented the check at the Merchants' Bank for payment. The Merchants' Bank told defendant that the check was good and would be paid at half-past one o'clock, the usual hour for exchanging checks between banks, which was according to the established custom of the banks at Pensacola. Defendant, without further demand on the Merchants' Bank, caused the check to be immediately "protested by a public notary, whereby the credit of the plaintiff and his reputation for solvency sustained great injury, to his damage \$25,000."

In another count it was alleged generally that defendant received from plaintiff, residing and doing business at Pensacola, his check on the Merchants' Bank of Pensacola, which had ample funds of plaintiff to pay the check, and upon defendant presenting the same to the Merchants' Bank it was not paid, whereupon defendant caused the check to be protested by a public notary, whereby the credit and reputation of plaintiff were greatly injured.

Defendant demurred on the ground that the declaration did not show a cause of action. The demurrer was sustained and judgment rendered for defendant.

The only question is whether, under the circumstances,



---

**Wittich v. First National Bank of Pensacola—Opinion of Court.**

---

defendant is liable in this suit for causing plaintiff's check to be protested for non-payment.

It has been held that a refusal by a banker to honor his customer's check, if he has sufficient funds in his hands to pay it, is actionable. *Marzetti vs. Williams*, 1 B. & Ad., 415; *Rolin vs. Steward*, 14 Com. B., 78 Eng. C. L. Rep., 595; *Addison on Torts*, (D. & B. Ed.,) 11.

But this is not the ground of the present action. The general rule in this country is, that the holder, in order to charge the drawer in case of a dishonor, is bound to present the check for payment within a reasonable time and to give notice of the dishonor to the drawer within a like reasonable time; otherwise the delay is at his own peril. This is where the drawer has funds in the bank when his check is drawn. *Story on Prom. Notes*, §493, 6th Ed., and *Notes*. But, though in such cases notice of demand and refusal to pay is necessary for absolute protection, it is not necessary to protest a check, as it would be in the case of a foreign bill. *Morrison vs. Bailey*, 5 Ohio St., 13; *Pollard vs. Bowen*, 57 Ind., 234; *Griffin vs. Kemp*, 46 Ind., 172; *Jones vs. Heilinger*, 36 Wis., 149.

A failure to give notice, however, will not discharge the drawer from liability unless he has suffered by the omission, and then only to the extent of the damage sustained. *Story on Prom. Notes*, §492.

It was, therefore, proper on the part of the defendant, the check not being paid on presentation, for his own protection to give notice to the drawer of non-payment. Defendant received the check on account of a claim in its hands for collection, and for that reason exercised proper caution. Though it may have been the custom among the banks of Pensacola to "exchange checks" at the close of the day's business, and plaintiff may have had funds in bank at the time of presentment to meet his check, the defendant could

---

---

**Wittich v. First National Bank of Pensacola—Opinion of Court.**

---

---

not know that the money would be there at a later period. Although the bank upon which the check was drawn had funds of plaintiff and ought to have paid the check on presentation, and may be liable for not paying it, the defendant does not appear to be responsible for the non-payment. He was clearly pursuing his right in giving notice to the plaintiff and could be held for any injury to plaintiff's credit and reputation growing out of the matter by giving the notice of non-payment.

While a "protest" is unnecessary in case of the non-payment of inland bills and checks of this description, that is, the employment of a notary to give the notice and make a written certificate of the facts of presentation, non-payment and notice under his notarial seal, yet, as the holder had a perfect right for his own protection to give the notice, we think he had an equal right to employ another to give the notice for him, and we discover no good reason why, for his own purposes, he may not employ the notary to certify to the fact. In the case of paper not requiring protest the notary's charges are of course not to be paid by the drawer.

"In a very frequent and important use relating to bills of exchange, protest, in legal strictness, means the formal declaration drawn up and signed by the notary, that he presented the bill for acceptance or for payment and that it was refused. In this sense it does not apply to inland bills or promissory notes, for as to these no presentment by notary, acting officially, is by the general mercantile law necessary. Any one may make the demand; though under statutes allowing the notary's certificate to be read in evidence of demand and refusal, the employment of one is usual and convenient." "Protest" is popularly understood to embrace all the steps necessary to charge those who may be liable, as well as mere presentment and official declara-

---

---

Crolly v. Clark and Alsop—Statement of Case.

---

---

tion of dishonor. Abbott's L. Dict., tit. *Protest*; 47 N. Y., 570; 2 Ohio State, 345.

Although a protest of plaintiff's check may have been unnecessary, it cannot be inferred that any injury was suffered by the plaintiff in consequence of it, and there is no allegation of special damages sustained by means of any wrongful, malicious or wilful conduct of the defendant in the matter. The unnecessary act of protesting the check is not necessarily a wrongful act. "If a man sustains damage by the wrongful act of another he is entitled to a remedy; but to give him that title two things must occur; damage to himself and a wrong committed by the other party." *Rex vs. Com'rs of Sewers*, 8 B. & C., 355; 1 Addison on Torts, 2.

The judgment must be affirmed.

---

PATRICK CROLLY, APPELLANT, vs. HENRY CLARK AND SARAH ALSOP, APPELLEES.

1. A last will and testament devising lands, executed in New York, having only two attesting witnesses, is of no effect in this State. As to real property in this State the estate of the deceased in such case is intestate.
2. Under the act of 1872 defining the interest the wife shall take in her husband's property, if the husband dies out of this State intestate, without children, the widow is the sole heir at law.

Appeal from the Circuit Court for Duval county.

Henry Clark and Sarah Alsop, the appellees, filed a bill against Patrick Crolly, the appellant, alleging Clark to be the surviving partner of a partnership, which was composed of himself and William Alsop, deceased, and did business at Jacksonville, Florida, under the firm name of

---

---

**Crolly v. Clark and Alsop—Statement of Case.**

---

---

Alsop & Clark, and that Sarah is the widow of said William, and that William died April 2d, 1883, in the City of New York, at his residence there; and that complainants in March, 1884, agreed in writing with Crolly to sell to him for \$3,000 a certain lot of land located in the City of Jacksonville, Duval county, State of Florida, they covenanting for themselves, their heirs and executors to make to Crolly a good and sufficient deed, with the usual covenants of warranty, conveying all the right, title, interest and estate which complainants "have, and which William Alsop had at the time of his death in and to the tract of land therein described on the payment" of said sum "as the price thereof," the said Crolly covenanting in said agreement to pay said sum on or before the first day of May on delivery to him by complainants, of such deed; that on and before May 1st, 1884, complainants in compliance with the covenants of said agreement, did offer to deliver to said Crolly a deed of the premises in the usual form of deeds of general warranty, signed by said Henry Clark and the said Sarah Alsop in her individual right as widow and sole heir at law of said William, and demanded payment of said sum, which deed complainants have "ready to be produced as this court may direct;" Crolly declined to receive the deed as not being in compliance with the covenants of the said agreement, and refused to pay the price, and still refuses to accept the deed or pay the price. That said Clark resided in Jacksonville, and was and is a citizen of Florida, and William Alsop resided in the City of New York, and was at the time of his death a citizen of the State of New York, and at the time of his death the title to said land was vested in the said William Alsop and Henry Clark, who were partners as aforesaid; that Alsop left no children nor living heirs, and also left a will "signed and sealed by him in the presence of two witnesses in confor-

---

---

Crolly v. Clark and Alsop—Statement of Case.

---

---

mity to the law of the State of New York” which “has been duly admitted to probate in said State.” The will devises (with other properties) to said Sarah, the widow, “for the *term of her natural life*” the testator’s share “in the mill and lands in Jacksonville, Duval county, State of Florida, she to enjoy the income arising from said properties during the term of and for her natural life.” The remainder in fee therein is devised to other persons, and the widow and two other citizens of New York are named as executors.

The defendant (says the bill) “sometimes pretends”:

“First. That the will of Wiliam Alsop, being good and valid under the laws of the State of New York, where said will was made and probated, to pass real estate, is good and valid as a devise of lands in Florida.

“Second. That if said will does not operate as a devise of said land, that the complainant, Sarah Alsop, is not the sole heir at law of her deceased husband as she claims to be, the said William Alsop not having died *in this State*, but that she has only a dower interest, or at her election a child’s part, or one-half of her husband’s interest therein.

“Third. That the said deed, as rendered, does not onvey all the right, title, interest and estate which the said William Alsop had in said lands at the time of his death, and is not therefore in compliance with the terms of said contract.

“While your orators aver and charge that the said will, having but two witnesses, is not operative as a devise of lands in the State of Florida; that William Alsop having died without children, his widow is his sole heir at law, as to all lands in this State; that one-half undivided interest of the said William Alsop, in and to the lands described in said agreement, vests by descent in his widow, your oratrix, Sarah Alsop; that the said Sarah Alsop has full right, power and authority in law to sell and to convey all the

---

---

Crolly v. Clark and Alsop—Argument of Counsel.

---

---

right, title, interest and estate in said lands which said William Alsop at the time of his death had in and to the same; and that the deed tendered by your orators to the defendant to which reference has been made conveys, or when delivered to the defendant will convey all the right, title, interest and estate which the said William Alsop at the time of his death had in the said lands as well as the estate and interest of your orators, Henry Clark and Sarah Alsop, therein.

“Complainants submit to the court that they are willing and prepared, and hereby offer on payment by the defendant of the said sum of three thousand dollars to deliver to the said defendant a deed in form as aforesaid conveying, as your orators insist, all the right, title, interest and estate which they have, and which the said William Alsop had at the time of his death in and to the tract of land heretofore described.”

The prayer of the bill is for a decree that the will of William Alsop is not operative as a devise of lands in the State of Florida, and that lands in said State, of which he died seized and possessed, including that involved in this suit, “did pass by descent” to Sarah, as widow and sole heir at law of said William, and that the said deed is a sufficient compliance with the said contract, and for specific performance, &c.

Crolly demurred to the bill, on the ground that it did not state a case entitling complainants to relief in a court of equity.

The demurrer was overruled by Judge Baker of the 4th Circuit and Crolly appealed.

*J. M. Barrs* for Appellant.

It is not denied that a will with two witnesses executed in New York is effectual to pass real estate there. The

---

---

Crolly v. Clark and Alsop—Argument of Counsel.

---

---

will in question was executed in New York, in compliance with the laws of the State of New York, by a citizen of New York who died in New York.

Did it not pass the real estate of the testator which was situated in Florida?

2d. As to the proper construction of the act of February 27, 1872, chapter 1878: The first section, it seems to us, clearly limits its application to cases where a man dies in this State. To deny this is to force into the minds of the legislators something not by them expressed, and only by us guessed at or, perhaps, thought by us to be more reasonable.

The second section either limits its operation to cases where the death occurs in this State, as does the first section, and is intended to apply to cases where no election is made by the wife, as is now provided for in the first section; or, (second,) applying to all cases no matter where the death occurs makes the rule different where the death occurs in this State from that where death occurs abroad; or else, (third,) applying in all cases takes from the wife the right of election granted by the first section.

We think that the first suggestion, to wit: that the second section limits its operation to cases where the death occurs in this State, as does the first section, and is intended to apply to cases where no election is made by the wife, as provided for in the first section, is the only one which will permit the two sections to harmonize, and is the most reasonable construction to be given it.

Does not the first section control and limit the operation of the second and confine the benefits conferred to the wife of a man dying intestate in the State of Florida as does the first section?

*Fleming & Daniel* for Appellees.

---

---

Crolly v. Clark and Alsop—Argument of Counsel.

---

---

The questions involved in this case come up on the demurrer to the bill filed for specific performance in the court below.

The points to be decided are:

1st. Whether a will executed in the State of New York in the presence of two witnesses, which in that State is good and valid to pass real estate, is effectual as a devise of lands in the State of Florida.

2d. Whether the widow of a man who dies intestate out of the State of Florida and without children is the sole heir at law of her deceased husband, or whether the provision in section two of the law of February 27th, 1872, chapter 1878, enures only to the benefit of widows whose husbands died in the State of Florida.

As to the first point, the statement of the law of the subject establishes it.

The statute now of force on the subject of last wills and testaments was enacted by the Legislature on the 20th day of November, A. D. 1828.

The 1st section of that act provides among other things that every person of the age of twenty-one years being of sound mind shall have power by last will and testament in writing to devise and dispose of his or her lands, provided that such will be attested and subscribed in the presence of the said testator or testatrix by three or more witnesses, or else it shall be utterly void and of none effect. McClellan's Dig., sec. 1, p. 985.

There has been no statute passed since this law was enacted doing away with the imperative requirement of at least "three witnesses."

The law of the place where the land is situate governs in the matter of the forms and solemnities requisite to give effect to a will designed to operate upon the same. 3d Washburn on Real Property, 3d Edition, p. 430.



---

---

Crolly v. Clark and Alsop—Argument of Counsel.

---

---

We have no law giving effect to a devise of lands if made according to the law of the place where the will is made, as is the case in Massachusetts and some other States.

The statute of February 24th, 1873, chapter 1939, entitled "An act providing for the acknowledgment of deeds and other conveyances of lands," providing that deeds to lands in this State executed in another State may be executed according to the laws of such other States, applies only to deeds; and it is presumed that that provision of section 1 of said law would be pronounced unconstitutional for the same reason that section 5 of the same law has been so pronounced by this court in Carr vs. Thomas, 18 Fla., 736.

The second point, as we have above intimated, involves the construction of section 2 of the act of February 27th, 1872, chapter 1878 of the Laws of Florida, found in McClellan's Digest, p. 476, where both sections of the act are put together in what is marked as section 5, on p. 476. We contend that the second section of the act should be so construed as to embrace all cases, whether the man die in this State or not.

The title of the act is general, being "An act defining the interest the wife shall take in the husband's property." The Constitution of Florida provides that the subject of each act shall be briefly expressed in the title. There being no limitation in the title the presumptions are that the Legislature did not intend to limit the law as enacted to the property of a man dying in this State intestate.

The first section of the act, it is true, reads: "If a man die in this State intestate, &c." the wife shall take the whole estate or dower at her election, and if the Legislature had stopped here the courts would in all probability

---

---

Crolly v. Clark and Alsop—Argument of Counsel.

---

---

confine the operation of the law to cases where the intestate died in this State.

The second section, however, has no such limitation but provides in general terms that where the husband dies intestate without children the wife shall be sole heir at law. It will be noted that there are larger privileges granted to the wife under the first section than under the second. By the first section the wife at her election may either take the whole estate (subject, of course, to the debts of her intestate husband) or dower (discharged, as is the law in our State, from her husband's debts).

The second section makes the wife the sole heir at law without any election of dower.

If it were intended by the Legislature to restrict the operation of the second section to estates where the intestate dies in this State without children, &c., it would be a mere repetition if not a contradiction of the first which makes the wife the sole heir at law of her intestate husband but gives her the election of dower. The second section makes the wife no more the sole heir at law than does the first, while the first section gives her the right to elect dower, which, if the second section is intended to be applied to the same class of cases, is not given to her by the last section.

The courts will so construe the two sections as to make them both operative and give meaning and effect to both, if such a construction can be put upon the statute.

Now assuming that the first section is limited to cases where a man dies in this State, &c., the wife has the privilege of taking the whole estate or dower at her election, while the second section being without limitation as to whether the man die in this State or not makes the wife a sole heir at law without the privilege of electing her dower.

This construction of the second section is fully within

---

---

Crolly v. Clark and Alsop—Opinion of Court.

---

---

the subject of the act as expressed in the title and we think harmonizes the two sections of the act and gives meaning and purpose to both.

An established rule of interpretation in considering a statute is, "that one part of a statute must be so construed by another that the whole, if possible, may stand." Potter's Dwarries on Statutes, p. 189.

THE CHIEF-JUSTICE delivered the opinion of the court.

Two questions are presented by the appeal in this case:

I. Whether a last will and testament executed out of this State, to wit: in the State of New York, only two witnesses attesting the execution thereof, is valid with respect to real estate in this State.

II. What is the effect of the act of the Legislature approved February 27, 1872, ch. 1878, in respect to the rights of the widow in the estate of her husband, he having died in another State, leaving no children, and, under the law of this State, intestate.

1. By the law of this State every last will and testament disposing of lands shall be signed by the testator or by some person under his express direction, and shall be attested and subscribed in the presence of the testator "by three or more witnesses, or else it shall be utterly void and of none effect." Act November 20, 1828, §51; McC. Dg., 986; Th. Dig., 192.

Probate of wills granted in other States are admitted to record in this State with the same effect as to the disposition of property as wills executed in this State; *Provided*, The said wills made out of the State of Florida shall have conformed to the laws thereof in the form and manner of their execution. Act November 20, 1828, sec. 59.

These are the only acts of legislation bearing on the ques-

---

---

Crolly v. Clark and Alsop—Opinion of Court.

---

---

tion. A will to affect real property in this State, made out of the State, must conform to the laws of this State as to form and manner of its execution. It must be witnessed by three or more witnesses, subscribing their names thereto as attesting its execution, or it is "utterly void and of none effect." A will, therefore, executed in presence of only two attesting witnesses is of no effect in this State, and a person dying without having executed a will in the manner required by our law is, as to property in this State, *intestate*.

2. The act of 1872 is "An act defining the interest the wife shall take in her husband's property." The whole body of the act is as follows:

"SECTION 1. If a man dies in this State intestate, without children, who shall at the time of his death be possessed of real and personal property, or either, the wife shall take the whole estate, or dower, at her election.

"SEC. 2. Where the husband dies intestate without children the wife shall be the sole heir at law."

The first section, in terms, refers to a husband's dying in this State; the second refers to a husband's dying in or out of this State. The sections are complete, each in itself, as though they were contained in separate acts. The object of the act is expressed in its title, to define "the interest the wife shall take in her husband's property," not only where he dies in this State, but in case of his death anywhere intestate and childless.

Whether the second section making the wife the sole heir at law affects her right of dower as previously secured to her by the statute, in case she should prefer dower only, it is not necessary here to determine.

With regard to the facts stated in the bill, the result is that as to the real estate of Mr. Alsop, it is an intestate estate under the laws of this State. He having died in New

---

The State ex rel. v. Co. Com'rs Sumter County—Opinion of Court.

---

York leaving real property in Florida, and without children, his widow is his sole heir at law.

The decree overruling the demurrer to the bill is therefore affirmed.

---

**THE STATE EX REL. JOHN H. MARTIN, PLAINTIFF, VS. THE COUNTY COMMISSIONERS OF SUMTER COUNTY, RESPONDENTS.**

1. Registration of voters can only be made in the manner and at the time prescribed by the act of 1877, chapter 3021, to wit: between the first Monday of October and a period ten days before the holding of a general election in the same year, at which time the registration books are required to be closed. Registration at any other time or in any other manner is not a legal registration.
2. The pendency of another proceeding by mandamus may be pleaded in abatement, where the parties and the matter are the same, the practice being assimilated to that civil suits.

Appeal from the Circuit Court for Sumter county.

The facts of the case are stated in the opinion.

*S. D. McConnell* and *John A. Henderson* for Relator.

*W. A. Hocker* for Respondents.

THE CHIEF-JUSTICE delivered the opinion of the court.

Relator's alternative writ says he presented to the Board of County Commissioners in June, 1884, his application in due form of law for a permit to sell intoxicating liquors in District No. 3, county of Sumter, that his petition was signed by a majority of the registered voters of the District, and the Board has refused to give him the permit.

Respondents return that the application was made to the Board in March, 1884, and not in June. That at the March

---

---

The State ex rel. v. Co. Com'rs Sumter County—Opinion of Court.

---

---

meeting they refused to grant the permit, because relator had not obtained a majority of the duly registered voters of the District to sign his petition, for that at the close of the last period, in October, 1883, appointed by law for the registration of voters, the number of voters duly registered was 124, that since that time there have been illegally added to the registration the names of 67 persons, of which 67 names 41 appear upon relator's petition for a license, and it is submitted that, therefore, the names of a majority of the registered voters of the district do not appear upon the petition.

Respondents further return that immediately after the refusal of the Board, in March last, to grant the permit, relator obtained from Judge King, Circuit Judge, an alternative writ of mandamus, basing the same upon the same petition for a permit and the refusal of the Board to grant it, which alternative writ commanded the Board to grant the permit or show cause. That this Board did make return of cause, to wit: on the third Monday in March, which cause was as herein above set forth. That thereupon relator demurred to said return, and the court overruled the demurrer, and said cause is still pending and undetermined in said Circuit Court.

Relator replies that he made his application for license in June, at the regular meeting of the Board, and the respondents refused the same.

And relator demurs to the residue of the return.

The principal question brought up by the demurrer is, whether any entry of names on the registration lists kept by the Clerk of the Circuit Court, at any other time than that specially appointed by the act of 1877, chapter 3021, sections 1 and 2, to wit: between the first Monday in October and a day ten days previous to any general election, is a legal registration; and whether, therefore, the

---

---

Clark v. Rugg—Statement of Case.

---

---

nes added to the registration list for District No. 3, in  
nter county, at any other time or in any other manner  
n as is provided in the said act, are registered voters.

The answer to the question is in the negative.

As to the pendency of another like proceeding based  
on the same petition for a license, in another court hav-  
ing jurisdiction to grant the relief herein prayed, the rule  
in other civil actions is applicable. High's Ex. Rem., §21.  
The return in this respect sets up matter in abatement  
in this suit. Two courts having equal jurisdiction ought  
not to be made use of at the same time to adjudicate the  
same matter for the same purposes.

The demurrer is overruled with leave to plead over.

---

W. CLARK, APPELLANT, vs. H. WISTAR RUGG, AP-  
PELLEE.

Where a Circuit Judge, in pursuance of Sec. 7, Art. 6. of the Consti-  
tution, has been assigned to hold a term of court in a county in  
another Circuit, he becomes, *pro hac vice*, the Judge of the Circuit  
Court for that county during the continuance of that term; and  
during that time the power of the resident Judge is superseded as  
to all causes pending in the Circuit Court in that county.

The rules of the Circuit Court in equity require that when an in-  
junction, receiver or other special order before final decree is de-  
sired, it shall be specially asked for in the bill. Rule 25.

Appeal from the Circuit Court for Leon county.

Section 7 of Article 6 of the Constitution of Florida is as  
follows:

SEC. 7. There shall be seven Circuit Judges appointed  
by the Governor and confirmed by the Senate, who shall

---

---

Clark v. Rugg—Argument of Counsel.

---

---

hold their office for eight years. The State shall be divided into seven Judicial Circuits, the limits of which are defined in this Constitution, and one Judge shall be assigned to each Circuit. Such Judge shall hold two terms of his court in each county within his Circuit each year, at such times and places as shall be prescribed by law. The Chief-Justice may, in his discretion, order a temporary exchange of Circuits by the respective Judges, or any Judge to hold one or more terms in any other Circuit than that to which he is assigned. The Judge shall reside in the Circuit to which he is assigned.

The other facts are stated in the opinion.

*John A. Henderson* for Appellant.

1st. "One Judge shall be assigned to each Circuit." The Chief-Justice may, in his discretion, assign or order any Judge to hold one or more terms in any other Circuit than that to which he is assigned. Const. 1868, section 7, art. 6. The Judge of the Third Circuit, having been assigned regularly, to hold the term of the Circuit Court for Leon county in the Second Circuit, became the Judge of the said court for Leon county, but not elsewhere, in the Second Circuit, during the specified term, and no longer. Judge Vann had all the powers of the Circuit Court over this case, at the time of making the order of March 26th by Judge Walker. Walker had none. *Bear vs. Cohen*, 65 N. C., 511.

2d. Receiver will not be granted before decree, unless a bill has been filed containing a specific prayer that a receiver may be appointed. *Dan. Ch. Plead. and Prac.*, (5th Ed.,) sec. 1734, and authorities cited. And only on evidence founded on the allegations of the bill. *Ibid*, sec. 1736; 1 *Beavan*, 301-6.



---

---

Clark v. Rugg—Argument of Counsel.

---

---

3d. The general rule is that a receiver cannot be appointed without notice. Dan. Plead. and Prac., sec. 1735, and note 1. The exceptions are “where irreparable injury would be sustained by delays,” or “where the property would be likely to perish before the defendant could have notice and be heard.” Same note. And then always the particular circumstances, which render the summary proceedings necessary, should be stated in the bill or petition upon which the application is grounded. Verplanck vs. Hor. Ins. Co., 2 Paige, 438; Swepson vs. Call & Baker, 13 Fla., 337.

4th. See 13 Fla., 337; Thompson vs. Maxwell, 14 Fla., 773.

5th. See Dan. Plead. and Prac., sec. 1740.

*Geo. W. Walker* for Appellee.

The first assignment of errors is that Judge Walker, at the time of granting an order appointing a receiver in this cause, had no jurisdiction for the reason that by order of the Chief-Justice another Judge, (Vann), was presiding over a term of court in Leon county, one of the counties included in the Second Judicial Circuit of this State, of which Judge Walker is the regularly constituted and appointed Judge.

Judges shall hear and decide cases pending in equity whenever the same may be in a condition to be tried and determined, whether in vacation or term time of the courts, and all decrees so rendered in vacation shall have the same force and effect as if rendered in term time. McC. Dig., 165.

How are the Circuit Judges appointed?

There shall be seven Circuit Judges *appointed* by the Governor and *confirmed* by the Senate. Sec. 7, Art., 6, Const. 1868.

How are they removed from office?

---

---

Clark v. Rugg—Argument of Counsel.

---

---

By *impeachment*. McC. Dig., sec. 1, p. 571.

I can see no authority under either of the above authorities granting to the Chief-Justice the power to *dispossess* or *remove* a Circuit Judge from his office, but do see the power to place him in vacation during a term by appointing a Judge of another Circuit to hold that term, under section 26, McC. Dig., p. 336. A Judge is considered in vacation when not presiding over a term. If, therefore, according to and by the express authority of our statute, the Chief-Justice orders, as in this case, the Judge of the Third Circuit to preside over a term in the Second Circuit for cause, it places the Judge of the Second Circuit in vacation to which his judgeship necessarily follows, he not having been removed or dispossessed of his office as Judge, therefore, he still being Judge and in vacation, has he not the power to hear equity cases. It is not contended that Judge Vann had no jurisdiction, but that Judge Walker did have jurisdiction; that their jurisdiction was concurrent and, therefore, it was elective as to the Judge before whom we wished to appear. We cite a case; while the decision is based on a statute, still the same general principle is involved. Cobin vs. Berry, 83 N. C., 27.

As to concurrent jurisdictions. 79 N. C., Haywood vs. Haywood, 42; 69 N. C., p. 126.

The second cause assigned as error is the failure of praying specially in the bill for the appointment of a receiver. We insist that this is not necessary, but that upon bill filed for the purpose of closing partnership concerns the appointment of a receiver is a matter of course. Martin vs. Van-Sharick, 4th Paige, 479; Innes vs. Lansing, 7th Paige, 583.

And again, it is enough that it be plain that it is necessary to put an end to the concern. Kerr on Receivers, p. 75; Dan. Ch. Plea. Pr., Perkin's Ed., Vol. 3, p. 1974; 6th Fla., 142.

---

---

Clark v. Rugg—Argument of Counsel.

---

---

As to the third cause assigned as error, viz: Notice not having been given. The general rule is that an application for a writ of injunction or for the appointment of a receiver must be upon notice to the opposing parties, yet if the act to be prohibited be such that delay would be productive of serious damage the writ will be granted or a receiver appointed *ex parte*. *The emergency must be judged of by the Chancellor in the exercise of a discreet judgment.* 13 Fla., 337; Rule 46 of Circuit Courts in Suits in Equity.

In this case there were two affidavits as to the imminent danger of the property being seriously damaged filed with the clerk and presented to the Judge upon the application for the appointment. See on this point Dan. Ch. Pl. & Pr., Perkin's Ed., page 1976.

As to the fourth assignment of errors, "that the receiver was appointed without bond being required of or executed by complainant," a receiver is an officer of the court, therefore when the court directs the property to be taken by a receiver it is supposed to be in the hands of the court, and it would seem a great hardship should the court compel complainant to give bond for the faithful performance of a duty of one of its own officers.

Fifth assignment of errors is: "That the receiver was not required to give bond."

The question whether or not bond shall be required of a receiver is a matter wholly within the discretion of the court and to be governed by the circumstances of each case. Dan. Ch. Pl. & Pr., Perkin's Ed., page 1977; High on Receivers, ch. 5.

And of that chapter, especially §120: "In New York the obligation of a receiver to give adequate security for the faithful performance of his trust is regarded as being founded upon the general practice of courts of equity, *and it is held to be within the power of the court to dispense with se-*

---

---

**Clark v. Rugg—Opinion of Court.**

---

---

*curity in case where it is plainly unnecessary.”* And §122: “Where a receiver is appointed as a part of the final judgment or decree in the cause and for the purpose of carrying out and executing that decree the fact that the court has failed to require any bond of the receiver constitutes no ground for the reversing of the decree on errors, since the omission will be regarded as the fault of the defendant in not insisting upon a bond.”

THE CHIEF-JUSTICE delivered the opinion of the court.

Rugg filed his bill in Leon county, Second Circuit, to dissolve a partnership between himself and Clark, in a certain steamboat, and the sale thereof and distribution of the proceeds, and for general relief. The bill was filed March 17th, 1884. On the same day the Spring Term of the Circuit Court commenced, Judge Vann, of the Third Circuit, presiding in place of Judge Walker, of the Second Circuit, under the order of the Chief-Justice assigning Judge Vann ‘to hold the term.’ Const., Art. 6, §7. The term of court was held by Judge Vann until the second day of April, when it was adjourned *sine die*. During the term the bill in this cause, together with certain affidavits in regard to the condition of the steamboat, were presented to Judge Walker, at chambers, who made an order “that A. Moseley, as receiver of this court, do immediately take possession of the boat in controversy and hold the same until the further order of this court, and that neither plaintiff or defendant intermeddle with said boat in any way until the further order of this court.”

This order was entered in the Chancery Order Book on March 26. Clark appealed from the order.

The grounds of appeal are, that at the time of making the order Judge Walker was without power as a Judge in

---

---

Clark v. Rugg—Opinion of Court.

---

---

Leon county to make such order, Judge Vann being the Judge of said court and alone had jurisdiction in the same cause. (2.) That the order was made without notice and without any prayer in the bill for the appointment of a receiver, and without any proper allegations showing the necessity of such appointment. (3.) That the receiver was placed in possession of the steamboat without requiring a bond either from complainant or the receiver.

The decision of a case in North Carolina in respect to the status and jurisdiction of the Judges where one Judge is assigned to hold a term in the place of another, seems to meet the first question in this case. It was there decided by the court that when the Governor requires a Judge to hold a term of a court, regular or special, for some county outside of his own district, the authority of the Judge is special; the jurisdiction of the proper Judge of the District is superseded by the substituted Judge in that county during the specified term in respect to all cases pending in the specified county. *Bar et al. vs. Cohen*, 65 N. C., 511, 513.

This concise statement of the law is so appropriate to the circumstances and the constitutional provision of our State we adopt it as expressing the views of this court. Judge Vann having been designated agreeably to the terms of the Constitution to hold the specified term in Leon county, became, *pro hac vice*, the Judge of the Circuit Court for Leon county during the continuance of the term, as to all causes pending in that county in the Circuit Court; and the authority of the resident Judge, as to such causes, was in the meantime superseded. As to all matters pending in other counties, and as to any special duties in matters not pending in the Circuit for Leon county, the authority of Judge Walker was not affected.

It follows that the order appealed from cannot be sustained.

---

---

Clark v. Rugg—Opinion of Court.

---

---

There was no prayer for a receiver, or an injunction contained in the bill. If the application for a receiver is made before decree, it will not be granted unless the bill contains a specific prayer that a receiver be appointed. 2 Daniel's Chy., 5th Ed., 1734; Pasco vs. Gamble and Poole, 15 Fla., 562, 571. The complainant must amend his bill to make this equitable remedy available. Ibid. And see Rules 25, 26, 41, Circuit Court Rules in Equity.

Respondent cites the language of Chancellor Walworth in Martin vs. VanSchaick, 4 Paige, 479, and Innes vs. Lansing, 7 Ib., 583; also Allen vs. Hawley, 6 Fla., 142, 163, to the effect that in suits to dissolve a partnership the appointment of a receiver is a *matter of course*, if the parties cannot agree among themselves as to the disposition of the property. In each of those cases the bill specially prayed for the appointment of a receiver.

Chancery Rules 25 and 26 have been in force since 1842 in Florida, (see 1 Fla. Rep.,) and specific prayers for special orders have always been required. That there may be exigencies in the progress of litigation in which the court may appoint a receiver when there is no prayer therefor in the bill may be true, as is held in Tennessee, especially as between the defendants, but that is an exception to the rule, which the court allows *ex necessitate*. Our practice is governed by our own rules of forty years standing.

The security to be exacted on the appointment of a receiver depends on the character of the property.

The order appealed from is reversed.

---

---

Boswell v. The State—Argument of Counsel.

---

---

GEORGE J. BOSWELL, PLAINTIFF IN ERROR, VS. THE STATE  
OF FLORIDA, DEFENDANT IN ERROR.

1. The conviction of a defendant of assault and battery, upon a plea of guilty, in a court held by a Justice of the Peace, constitutes no bar to a subsequent indictment and prosecution for an assault with a deadly weapon with a premeditated design to effect death, or an aggravated assault, based on the same act.
2. A conviction or acquittal, in order to be a bar to another prosecution, must be for the same offence, or for an offence of a higher degree, and necessarily including the offence for which the accused stands indicted.
3. A legal acquittal or conviction in any court of competent jurisdiction is sufficient in law to preclude any subsequent proceedings for the same offence in any other court.
4. In cases of concurrent jurisdiction in different tribunals, the one first exercising such jurisdiction acquires control to the exclusion of the other.
5. When the charge of the court to the jury is not embodied in the record so that this court may examine it, it will be presumed to have been correct, and that the law was properly given to the jury.

Writ of Error to the Circuit Court for Hernando county.

The facts of the case are stated in the opinion.

*J. B. Wall* for Plaintiff in Error.

There are two assignments of error, (the first and second being one and the same in effect,) viz: the sustaining of the demurrer and overruling the plea of *autrefois convict*, and the instruction of the judge to the jury, that they could not convict the defendant of a bare assault, or of assault and battery, under the indictment.

The first assignment is well taken and requires no argument before this court.

“If there is anything settled in the jurisprudence of

---

---

**Boswell v. The State—Argument of Counsel.**

---

---

England and America, it is that no man shall be twice punished by judicial judgments for the same offence." *Ex-Parte Lange*, 18 Wall, U. S. S. C., 163.

As to what constitutes an identity of offences within the constitutional meaning, the rule laid down in the *State vs. Smith*, 43 Vermont, 324, may be taken as sufficiently explicit.

"When one offence is a necessary element in, and constitutes an essential part of another offence, and both are in fact but one transaction, a conviction or an acquittal of one is a bar to a prosecution for the other."

This dictum is not limited to convictions and acquittals by the verdict of a jury. A plea of guilty has the same effect as a verdict of conviction. 1 *Bishop Criminal Law*, 6th Ed., 1049; *People vs. Goldstein*, 32 Cal., 432; *Shepherd vs. People*, 25 N. Y., 406.

A conviction for assault, or assault and battery, before a Justice of the Peace, such officer having jurisdiction under our laws to hear and determine those offences, will bar a prosecution for any higher grade of the same offence, such as assault with intent to murder, &c. 1 *Bishop Crim. Law*, 6th Ed., 1058; *State vs. Smith*, 43 Vt., 324.

And some English and American authorities, holding the contrary, have been declared unsound in principle. 1 *Bishop Crim. Law*, 6th Ed., 1057.

In further support of our position we will simply refer the court to the following authorities: 1 *Wharton Amer. Crim. Law*, 6th Ed., 563; 1 *Chitty Crim. Law.*, 452, 462; *Com. vs. Squire*, 1 *Metcalf*, 258; *Lohman vs. People*, 1 *Comstock*, N. Y., 379; *State vs. Townsend*, 2 *Harrington*, Del., 543; *Hulley vs. State*, 23 *Ind.*, 21; *Com. vs. Olds*, 5 *Littel*, Ky., 137; *Hawkins*, P. C., 515, 526; *Moore vs. People of Ill.*, 14 *Howard*, N. S., 13; *State vs. Casey*, *Busbee*, N. C., 209; *Com. vs. Goddard*, 13 *Mass.*, 455; *Com.*



---

**Boswell v. The State—Opinion of Court.**

---

vs. Loud, 3 Metcalf, 328; Roberts vs. State, 14 Ga., 8; Com. vs. Miller, 5 Dana, 320; Com. vs. Cunningham *et al.*, 13 Mass., 245; McGinnis vs. State, 9 Humphrey, Tenn., 43.

In support of the second assignment, that the court erred in instructing the jury that they could not convict the defendant of a bare assault, or of assault and battery under the indictment, we need only refer the court to chapter 3271 Laws, approved February 4, 1881.

If the plea of former conviction was not a bar to the indictment, and the Circuit Court had so held, it was competent for the jury, if the evidence warranted the finding, to convict the defendant of assault and battery, or of a bare assault, and the instruction of the court that they could not do so tended to mislead them to the prejudice of the defendant, was contrary to law and evidence.

The judgment should be reversed and the cause remanded with instructions to dismiss the indictment and discharge the prisoner.

*Attorney-General* for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

In October, A. D. 1883, George J. Boswell was indicted for an assault with a deadly weapon, with intent to murder one Jacob C. Clements. On the 11th day of March, 1884, the defendant filed plea in bar. This plea in bar alleges that on the 28th day of September, A. D. 1883, he, defendant, was arrested on a warrant issued by one J. W. Fleming, a Justice of the Peace for the county of Hernando; that such warrant was based upon an affidavit made by one W. H. Havron, charging the defendant with the commission of an assault and battery upon Jacob C. Clements, on the 23d day of Sept., 1883; that the defendant was arrested

---

---

Boswell v. The State—Opinion of Court.

---

---

on such warrant, arraigned before the Justice of the Peace; that he plead guilty to the charge of assault and battery, and was, by the said Justice, fined five dollars and the costs of the prosecution, amounting to eight dollars and ninety cents; that the charge of assault and battery upon which the defendant was arraigned and tried was the same offence for which the defendant stands indicted; that the alleged assault with intent to murder for which he stands indicted is the identical assault for which he was so tried before the said J. W. Fleming, and for which he was fined five dollars and costs, and that the said J. C. Clements is the identical person named in the proceeding before the said Justice of the Peace; that to try the said George J. Boswell upon the indictment would be to subject him to be placed in jeopardy a second time for the same offence.

To this plea the State Attorney demurred as follows:

1. Said plea sets up no sufficient defence in bar of said prosecution.

2. Said plea does not show that the alleged conviction of the defendant was had before a court having jurisdiction of the cause herein charged against the defendant.

3. Said plea does not show that the defendant was convicted of the crime of assault with intent to murder.

The court sustained the demurrer and the counsel for the defendant duly excepted to such judgment of the court.

The case was tried and the jury found the prisoner guilty of an aggravated assault and recommended him to mercy.

Counsel for defendant then moved for a new trial upon the following grounds:

1. The court erred in sustaining the State's demurrer to the defendant's plea *autrefois convict*.

2. In overruling and setting aside the defendant's plea of *autrefois convict*.

---

---

Boswell v. The State—Opinion of Court.

---

---

3. In instructing the jury they could not convict the defendant of assault and battery or of a bare assault under the indictment.

4. The verdict is contrary to law.

5. The verdict is contrary to the evidence.

This motion for a new trial was overruled and an exception taken.

The defendant was then sentenced by the court to pay a fine of fifty dollars and costs.

The defendant brings the case here on writ of error.

The principal question arising in this case is one of importance. Does the conviction of a defendant upon a plea of guilty of assault and battery in a court held by a Justice of the Peace bar the conviction of the same defendant of an aggravated assault.

By our laws Justices of the Peace have power to try cases of assault or assault and battery, not charged to have been committed riotously, or upon any public officer in the execution of his duty, or with intent to commit any other offence. And of all other offences punishable by fine not exceeding one hundred dollars, or punishable by imprisonment in the county jail not exceeding three months, or punishable by both fine and imprisonment. McC. Dig., 62.

An assault with a deadly weapon, with a premeditated design to effect the death of the person so assaulted, is made a felony, and is punishable by imprisonment in the State penitentiary not less than two years and not more than seven years, or by fine of not less than five hundred dollars. McC. Dig., 354, §29.

It is also provided that "whoever assaults another with a deadly weapon, *not having* a premeditated design to effect the death of the person assaulted, shall be deemed guilty of an aggravated assault, and upon conviction shall be pun-

---

**Boswell v. The State—Opinion of Court.**

---

ished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars." McC. Dig., 387, §2.

The law gives to Justices of the Peace no authority or power to try parties charged either with the crime of an assault with a deadly weapon with a premeditated design to effect death, or with what is above denominated an aggravated assault. A legal acquittal or conviction in any court of competent jurisdiction is sufficient in law to preclude any subsequent proceedings for the same offence in any other court. The court must have been a court having jurisdiction.

Had this defendant been again arrested in a court held by a Justice of the Peace for an assault and battery, his plea of *autrefois convict* would have been good, and would have barred such second attempt to try him on that charge. The Circuit Court alone has jurisdiction of the crime charged in the indictment and of the crime of which he is found guilty. The crimes charged are distinct and different in their nature, and while the courts of Justices of the Peace have *sole* jurisdiction of assault and battery, the Circuit Courts have *sole* jurisdiction in assault with intent to murder and aggravated assaults. In cases of concurrent jurisdiction in different tribunals, the one first exercising jurisdiction acquires control to the exclusion of the other. Counsel for the defendant cites *Ex parte Lange*, 18 Wall., 163. Justice Miller, in the opinion in that case, says: "If there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there

---

**Boswell v. The State—Opinion of Court.**

---

has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the *same court, on the same facts, for the same statutory offence.*" This undoubtedly is the true rule. In the case at bar one W. H. Havron made the affidavit upon which the warrant was issued by the Justice of the Peace for the arrest of Boswell for the assault on J. C. Clements. Boswell plead guilty, no evidence was taken, it does not appear that Clements was present, or knew anything of the arrest, and upon the plea of guilty Boswell was fined five dollars and costs. The indictment found is not for the same statutory offence, and is in a different tribunal. In the case of Commonwealth vs. Roby, 12 Pick., 496, Shaw, C. J., in the opinion, speaks as follows: "In considering the identity of the offence, it must appear by the plea that the offence charged in both cases was the same *in law* and *in fact*. The plea will be vicious, if the offences charged in the two indictments be perfectly distinct in point of law, however they may be connected in fact." Again he says in the same opinion: "So Chitty, speaking of the identity of the offence requisite to support such a plea, states it thus: 'As to the identity of the offence, if the crimes charged in the former and present prosecution are so distinct that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law, to say that the offences are so far the same that an acquittal of the one will be a bar to the prosecution of the other,' " and cites 1 Chit. Crim. Law, 453.

The rule is well settled that the former acquittal or conviction must have been for the same identical act and crime. Burns & Cary vs. The People, 1 Park., C. R., 182; 1 Black Com., 336.

In the case of Prine and Smith vs. The State, 51 Texas Rep., the facts were as follows: The defendants were ar-

---

**Boswell v. The State—Opinion of Court.**

---

rested and tried before a Justice of the Peace for an aggravated assault. They were found guilty of a simple assault and fined. Subsequently they were indicted for an aggravated assault. They plead the former conviction of a simple assault, and their acquittal on the charge of aggravated assault. Exceptions to this plea were sustained and they were convicted of the aggravated assault. The Supreme Court say: "If the jury should have found them guilty of a simple assault and battery only, according to their view of the evidence, then they could have been acquitted under their special pleas. But as the jury found the defendants guilty of an aggravated assault and battery, that being an offence of which the Justice of the Peace had no jurisdiction, their special pleas would not have availed the defendants as a defence in this case, and consequently they suffered no injury by their special pleas of *autrefois acquit* and *convict* being overruled and excluded by the court."

In the case of Bob. White vs. The State, 9 Texas Ct. Ap., 390, the facts were, that the defendant was tried and convicted for an aggravated assault. To the information he interposed a special plea of former acquittal before a Justice of the Peace on a charge of assault and battery. The court of appeals in reviewing the case, say: "The defendant having been tried and acquitted upon a complaint before a Justice of the Peace, and the justice not having jurisdiction of the offence here charged in this information, the defendant can plead it only to prevent a conviction of a simple assault, or assault and battery. While it would have been proper for the court to have submitted the special plea to the jury with the plea of not guilty, so that it would have been a bar to a conviction of simple assault and battery, yet, as the jury found the defendant guilty of an aggravated assault and battery, that being an offence of which the justice had no jurisdiction, and the defendant

---

---

**Boswell v. The State—Opinion of Court.**

---

---

not having been tried on and acquitted upon indictment or information, his special plea could not have availed in this trial, and consequently no injury could have resulted to the defendant by the action of the court in relation thereto." See also *State vs. Littlefield*, 70 Me., 452; *Howard vs. State*, 8 Texas Ct. Ap., 447; *Irwin vs. State*, 7 Ib., 78.

In the *State vs. Foster*, 33 Iowa Rep., 525, the facts were that the defendant was indicted for an assault with intent to inflict a great bodily injury. He pleaded a former conviction before a Justice of the Peace, on a charge of assault and battery, alleging that the same act is the foundation of both charges. A demurrer to the plea was overruled. "The Supreme Court of Iowa in reviewing the case, says: The demurrer could only have been overruled by the district court upon the view that the offences charged are, in each case, identical, or the one for which defendant was convicted before the justice includes the one charged in the indictment. But neither proposition can be admitted.

\* \* \* Admitting that the offence of assault and battery, and assault with intent to commit a great bodily injury, are degrees of the same offence, it must be conceded that the first named is of lower degree and does not include the offence of the higher degree. To this proposition there can be no objection. While an assault with an intent to commit a great bodily injury may include an assault and battery, it is clear that the assault and battery cannot include the higher assault; the less cannot include the greater. A conviction or acquittal, in order to be a bar to another prosecution must be for the same offence, or for an offence of a higher degree, and necessarily including the offence for which the accused stands indicted. It follows that a conviction or acquittal for a minor offense is no bar to a prosecution for a greater offence except in the case of acquittal for manslaughter, which would bar an indictment

---

---

Boswell v. The State—Opinion of Court.

---

---

for murder, for the reason that if the defendant was innocent of the killing without malice he could not be guilty of killing with malice,' and cites Hunt vs. State, 25 Miss., 378; Scott vs. U. S., Morris, 142.

In the case before us the defendant is indicted and tried for an offence of which the Justice of the Peace had no jurisdiction; the Circuit Court in which he was tried had no original jurisdiction of the offence for which he was tried in the justice's court. If the jury in the Circuit Court had found the defendant only guilty of an assault and battery, a minor offence for which he had been tried and convicted in the Justice's court, then the plea *autrefois convict* would have been a bar to a conviction in the Circuit Court, provided the same had been submitted to the jury with the plea of not guilty. But they found him guilty of another and higher offence, and his special plea could not have availed him had it been so left to the jury.

The demurrer, we think, was properly sustained.

The other assignments of error are as follows:

"In instructing the jury that they could not convict the defendant of assault and battery or of a bare assault under the indictment." "The verdict is contrary to law and the evidence." The charge given by the Judge to the jury nowhere appears in the bill of exceptions. We are, therefore, not informed whether he so charged the jury or not. The presumption is, in the absence of such charge, that it was correct, and that the law was properly given to the jury. The only reference to the charge in the record is as follows: "And the said Judge, under his charge and instructions, submitted the issue and the evidence to the jury."

The judgment is affirmed.



---

---

McClerkin v. The State—Syllabus.

---

---

ROBERT MCCLERKIN, PLAINTIFF IN ERROR, VS. THE STATE  
OF FLORIDA, DEFENDANT IN ERROR.

1. In order to convict a defendant of the crime of perjury, the offence must be proved by the oath of two witnesses, or by the oath of one witness and by other independent and corroborating circumstances which is deemed of equal weight with another witness.
2. After the jury retired to their room to consider of their verdict the Judge went home. Upon the return of the Judge the jury came into court to deliver their verdict. The Clerk was absent. The jurors were called and answered to their names, were then asked by the Judge if they had agreed upon their verdict, and having answered that they had so agreed, delivered the same in writing to the Judge. The Judge received the verdict and handed it to the Sheriff, and then adjourned the court until the following day. Before the Judge left the court room the Clerk came in, the Sheriff gave him the verdict of the jury and he recorded it in the minutes of the court: *Held*, not to be error; the Clerk is only the official scribe of the court. He is to keep regular and fair minutes of all the proceedings of the court. The duty of signing the minutes so kept by the Clerk is imposed upon the Judge, and his signature alone gives them verity.
3. The Judge may keep his own minutes of the court by entering them himself, make his own adjournments, swear the witnesses, receive the verdict from the jury, and record or cause the same to be recorded in the minutes, which he subsequently verifies by his signature.
4. A motion in arrest of judgment arises from *intrinsic* causes appearing upon the face of the record. It is not the proper remedy for a wrong verdict, nor is it the proper remedy for an illegal admission of evidence. It does not and cannot take place and answer the purposes of a motion for a new trial.

Writ of Error to the Circuit Court for Leon county.

The facts of the case are stated in the opinion.

*S. D. McConnell* for Plaintiff in Error.

---

---

McClerkin v. The State—Opinion of Court.

---

---

*The Attorney-General* for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

On the 20th day of October, A. D. 1881, at a term of the Circuit Court of the Fifth Judicial Circuit held in and for the county of Marion, the grand jury found an indictment against the plaintiff in error, Robert McClerkin, for the crime of perjury. He was duly arraigned, plead not guilty, was tried and was found by the jury guilty. Counsel for the defendant then moved for a new trial upon the following grounds:

1st. Because the verdict of the jury was found upon the testimony of one witness, and not upon the testimony of two witnesses as is required by law.

2d. Because the verdict of the jury was contrary to the evidence and without evidence to sustain it.

3d. Because the court erred in receiving the verdict when neither the Clerk of the Court nor either of his deputies were present in court.

4th. Because when the jury rendered their verdict neither the clerk nor either of his deputies was present in court and the verdict was received by the court in the absence of the clerk and his deputies, and was by the court handed to the sheriff, and the court was thereupon adjourned, no clerk or deputy clerk being present at the time of such adjournment.

5th. Because the verdict is contrary to law.

This motion was overruled by the court and defendant's attorney excepted. The counsel then moved in arrest of judgment for similar reasons as are above assigned on motion for a new trial. This motion was also overruled and defendant's counsel took an exception. The court sentenced

---

---

McClerkin v. The State—Opinion of Court.

---

---

the defendant to two years imprisonment in the State penitentiary. The case is in this court on writ of error.

The record discloses the following facts:

One Arthur Williams was arrested upon a warrant issued by Samuel F. Marshall, County Judge and *ex-officio* Justice of the Peace of Marion county, upon the charge of assault with a deadly weapon, with a premeditated design to effect the death of July Brown. On the examination before said County Judge it became necessary to prove what weapon was used in the commission of the assault. McClerkin, the defendant in this case, was subpoenaed as a witness against Williams, and he produced in court a certain hickory stick with which he testified Williams committed the assault upon Brown. Subsequently McClerkin was indicted for perjury, the indictment alleging that the stick so produced by him before the County Judge was not the stick with which Williams committed the assault. This is the perjury alleged. On the trial of this defendant upon the indictment, A. B. Crutchfield testified that he as the sheriff of Marion county; that Arthur Williams was arrested upon a warrant and had an examination before Judge Marshall; McClerkin was subpoenaed in that court to bring into court the stick with which Williams struck Brown; he came into court and produced this stick, (showing to the jury a hickory stick one inch in diameter with a knob on the end, of the same diameter, but not loaded,) and testified that it was the stick with which Williams struck Brown. The defendant, on that examination, was asked, "if this was the stick with which Arthur Williams struck July Brown when he assaulted the said July Brown, as charged in the warrant, and the answer was that it was."

July Brown testified: "I was present at the preliminary trial of Arthur Williams before Judge Marshall for assault upon me; don't remember the date; defendant, McClerkin,

---

---

McClerkin v. The State—Opinion of Court.

---

---

was a witness, he came into court with this stick, (the same referred to by Crutchfield) and said it was the stick with which Arthur Williams struck me; he was sworn; this is not the stick; the stick used by Williams was a supple, wrapped whalebone stick with a ball on the head, and belonged to the defendant, McClerkin; Williams snatched it from him and struck me on the head, holding the small end of the stick. The blow was a severe one; it knocked me senseless and fractured my skull, and it was dressed by Dr. Gary.”

Amzia Vance testified that he was present at the examination before Judge Marshall; that on that examination McClerkin testified that this stick, (the one referred to by the last two witnesses) was the stick with which the assault was committed; “this is not the stick Williams struck Brown with—a palmetto stick—a supple stick which looked like this except it had a piece of lead tied on the end with a string; \* \* \* the stick was same shape and nearly like this; could not have told the difference between the two without examining it.”

Wilkes Henec testified that he was present when the assault was committed; that the assault was committed “with a loaded stick.” I was present at Williams’ preliminary examination and heard McClerkin testify; he said that Williams struck Brown with this stick (referring to the same stick as referred to by the other witnesses); this is not the stick with which Williams struck Brown; the only difference between this stick and the one used was that the stick with which the blow was given was a rattan supple stick and loaded.”

This is the substance of the evidence as appears from the record. All of the witnesses testify that the hickory stick which McClerkin testified was the one used in the commission of the assault was not the stick so used. All three of

---

**McClerkin v. The State—Opinion of Court.**

---

them say it was a loaded stick. Upon this evidence the jury have found the defendant guilty, and they are made the judges of the credibility of the witnesses. In Wharton's Criminal Law, §802, it is said: "It was formerly held that there must be two witnesses upon an indictment for perjury; that one alone is not sufficient, because there is in that case only one oath against another. The strictness of this rule, however, has long since been greatly relaxed; the true principle being that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence." Again in §804 it is said: "If the assignment of perjury be directly proved by one witness and strong circumstantial evidence be brought forward, such evidence will supply the want of another witness.

The same rule is laid down in 1 Greenleaf on Evidence, 13th Ed., §257; United States vs. Wood, 14 Peters, 436; Com. vs. Pollard, 12 Met., 225.

To convict of the crime of perjury, the offence must be proved by the oaths of two witnesses, or by the oath of one witness, and by other independent and corroborating circumstances, which is deemed of equal weight with another witness. Such is the rule now, well established on authority. We cannot say that there was error in the verdict of the jury. This disposes of the first and second grounds upon which the motion for a new trial was asked.

The third and fourth grounds upon which the court were asked to grant a new trial are substantially the same. The record upon this subject recites the following facts: "After the said jury had retired to their room and were considering of their verdict, his honor, the presiding judge, left the court-room, and went home to his supper. And afterwards, upon the return of his honor, the presiding judge, into the court room the jury returned into court to

---

**McClerkin v. The State—Opinion of Court.**

---

deliver their verdict, whereupon the clerk still being absent, the court orders him to be called by the sheriff, whereupon he was so called, but failed to answer, and the deputy clerk was likewise called, but failed to answer; whereupon the jurors being called, and all having answered to their names, were asked by the court if they had agreed upon a verdict, and having answered that they had so agreed, delivered to the presiding judge the following verdict: 'We, the jury, find the defendant guilty.' And the said presiding judge, having received the said verdict, as aforesaid, delivered the same to the sheriff and adjourned the court until the following day at half past nine o'clock A. M., there being no clerk or deputy present in court. After the court had adjourned as aforesaid, but before the judge left the courtroom, the deputy clerk came into court. The sheriff then handed the verdict of the jury to the said deputy, who, or the chief clerk, recorded it. The verdict so recorded is the same that was returned by the jury to the court, is the verdict on which the judgment of the court is founded."

No exception was taken to the action of the court in receiving the verdict from the jury, or in subsequently causing the same to be entered upon the minutes of the court. The verdict and judgment appear in the record to have been properly recorded. There is no statute in this State requiring the presence of the clerk at this or other particular steps in cases on trial before a jury, or making it essential to the reception of a verdict, or to give such verdict and the judgment thereon validity. It is his duty to keep "regular and fair minutes of all proceedings" of the court, but he is not required or authorized to sign them; that duty is imposed upon the judge, and his signature alone gives them verity. The clerk is only the official scribe of the court. He can administer oaths, so can his deputy, and so can the judge. He alone, under the statute,

---

---

McClerkin v. The State—Opinion of Court.

---

---

can draw the grand and petit jury, and his duties generally are prescribed by statute. The Constitution of this State, Article 6, Section 6, provides that “such Judge (Circuit) shall hold two terms of his court in each county within his Circuit each year, at such times and places as shall be prescribed by law.”

In *Hobart vs. Hobart*, 45 Iowa, 503, the court, speaking of what is required to be had in open court, says: “We are first charged with the task of determining the purport and effect of the words ‘*open court*.’ Blackstone, adopting Coke’s definition, says: ‘A court is a place wherein justice is judicially administered.’ 3 Bl. Com. 24. But this definition obviously wants fullness; it is limited to the *place* of a court in its expression. In addition to the place there must be the presence of the officers constituting the court, the judge or judges certainly, and probably the clerk authorized to record the action of the court; time must be regarded, too, for the officers of a court must be present at the place, and at the time appointed by law in order to constitute a court. To give existence to a court, then, its officers and the time and place of holding it, must be such as prescribed by law. The Circuit Court is to be held by the Circuit Judge, and its terms are prescribed by law. The places of holding it are also prescribed, and it cannot be held elsewhere. To constitute the Circuit Court, then, the Circuit Judge must be in the discharge of judicial duties, at the time and in the place prescribed by law for the sitting of the court.”

In the case of *Mealing vs. Price*, 14 Geo., 596, 669, Judge Lumpkin, speaking for the court, upon the subject of courts, says: “Our opinion is that the exception itself” (to the legality of the court for want of a clerk) “is based upon a false assumption; and that is, that the office of clerk is necessary to the existence of the court. While we

---

---

McClerkin v. The State—Opinion of Court.

---

---

hold that he is a very proper officer to keep regular and fair minutes of all the proceedings of the court of which he is the clerk, as he is required to do by the 34th section of the judiciary act of 1799, still we are quite clear that the court can live and move and have its being without him, it can keep its own minutes by entering them itself, and sign them as is now done; and make its own adjournment from day to day, or for a longer time, to suit its own and the public convenience, without a clerk. Nor is there anything in our statutes, which is repugnant to this conclusion. There are some things, *perhaps*, which the clerk alone can perform, but as to adjournments he has neither part nor lot in the matter. So we say the judge may receive the verdict from the jury, and record, or cause the same to be recorded in the minutes, which he subsequently verifies by his signature. We cannot see, in the light of the facts, as they appear in the record, the Constitution of the State, and the statutes, that the court committed any error in receiving, or in causing the verdict in this case to be recorded. There was, in the absence of any objection or exception upon the part of the defendant, an implied consent that the verdict should be received, and the jury not unnecessarily detained. The verdict, after it was received by the court, was subject to the judgment and control of the court. *Wathan vs. Pennebaker*, 3 Bibb, 99.

The assignment of errors filed in this cause, contains what is claimed to be the third error in these words: "The court, in refusing to grant the motion in arrest of judgment made by the appellant in said cause."

The motion in arrest of judgment was based substantially upon the same grounds upon which the motion for a new trial had been made and overruled. No defect was alleged in the indictment or in any of the subsequent pleadings. "Motions in arrest of judgment arise from *intrinsic*



---

---

Ex Parte, Samuel Thompson—Opinion of Court.

---

---

causes, appearing upon the face of the record.” Sedgwick vs. Dawkins, 18 Fla., 335; Hyer vs. Vaughn, 18 Fla., 647.

“A motion in arrest of judgment is not the proper remedy for a wrong verdict. The remedy is not a motion to have the judgment arrested, but a motion to have the verdict set aside and a new trial granted. Nor is a motion in arrest of judgment the proper remedy for an illegal admission of evidence.” State vs. Snow, 74 Me., 354.

The court committed no error in either overruling the motion for a new trial, or the motion in arrest of judgment.

The judgment is affirmed.

---

EX PARTE, SAMUEL THOMPSON.

The 18th section of the Internal Improvement act of 1855, in exempting the employes of certain railroads from the duty of working on public roads, gave an immunity to such employes, but such immunity was not in the nature of an irrevocable contract with the roads or the laborers. The repeal of the immunity and imposing the duty was within the discretion of the Legislature.

The facts of the case are stated in the opinion.

*John A. Henderson* for Petitioner.

*The Attorney-General* for the State.

THE CHIEF-JUSTICE delivered the opinion of the court.

Samuel Thompson was arrested and fined before a Justice's court for refusing to work on the public roads. Being confined by the sheriff under the sentence of the court he applied for a discharge on the ground that he was an employe of the Florida Central and Western Railway Co., the successor to the Fla., A. and G. C. Railroad Co., and is

---

**Ex Parte, Samuel Thompson—Opinion of Court.**

---

exempt from duty on the public roads under the provisions of the Internal Improvement Act of 1855, the first named company having accepted the provisions of that act and being entitled to its privileges.

Waiving the question whether the status of the petitioner as such employe was properly presented before the court, we consider the question presented by the petition.

The 18th section of the act referred to provides "that all the officers of the companies, the servants and persons in the actual employment of the companies be and are hereby exempt from performing militia duty, working on roads and serving as jurors."

In 1877 the Legislature enacted that "all able bodied males over the age of eighteen and under the age of forty-five, residents of any county in this State twenty days, shall be liable and subject to work on the public roads and highways in such counties." Ministers of the Gospel only are exempted. Ch. 3026, act of 1877. This is a re-enactment of sec. 13, ch. 2077, acts of 1874, which act repealed all laws conflicting with it.

The 18th section of the act of 1855, so far as it exempts certain employes from highway duty, was an exemption extended to the employe. It was no immunity to the railroad companies or their property. The law exempted certain persons from a certain duty. This law is repealed and the persons are made liable to the duty. We perceive no violation of organic law in the repeal.

Again, the original railroad company has ceased to exist and the road has passed to other hands. The road in the hands of the company that constructed it was exempted from taxation for a term of years.

In the case of the L. and N. R. R. Co. vs. Palmes, 109 U. S., 244, the Supreme Court declares exemption from taxation to be not assignable; following *Morgan vs. Louisiana*,

---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Syllabus.

---

U. S., 217 and affirming *Palmer vs. R. R. Co.*, 19 Fla.,

.. The principle may be applied here.

There is nothing in the exemption of persons from road jury duty which savors of contract. There may be good reasons why persons operating railroads should not be subjected to duties which may interrupt the operation of the road. The Legislature has provided that actual labor on public roads may be excused on payment of a commutation in money. But beyond this they subject all persons supposed to be able to labor to road duty, and the Legislature having thus expressed its will we cannot question the expediency of its action.

The petitioner is remanded and the writ dismissed.

---

ned.

UBEN B. GARNETT ET UX., APPELLANTS, VS. THE JACKSONVILLE, ST. AUGUSTINE AND HALIFAX RIVER RAILWAY COMPANY, APPELLEE.

construction of a railway to be operated by steam along the streets of a municipal corporation to be used for a private purpose on a line of route not authorized by the character of the company proposing to construct it and authorized only by the municipal corporation in a resolution clearly beyond its powers, may be a public nuisance. But if so, it is to be abated by a suit in behalf of the State. The owner of land or lots abutting upon the street over which the railway is proposed to be constructed has not an equity to enjoin its threatened construction as a public nuisance, operating to his special and peculiar injury, where the road intended to be constructed is an ordinary surface railway to be operated by steam.

Appeal from the Circuit Court for St. Johns county.

The facts of the case are stated in the opinion.

J. M. Cooper for Appellants.

---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Argument of Counsel.

---

“The corporate authorities of a town have no right to appropriate the public streets to any other uses than that of travel or right of way to which they were dedicated and the convenience of the whole public; and they cannot lawfully obstruct the streets with public or private buildings; and any person whose property is especially injured thereby may have the aid of the courts of equity to restrain such improper appropriation.” *Lutterloh vs. Mayor, &c., of Cedar Key*, 15 Fla., 306.

There is no allegation in this case as to where the fee of the street is; but in such case, where complainant alleges that his lot bounds on the street, the fee will be presumed to be in him to the centre of the street. *Higby & Riggs vs. Camden and C. R. R. Co.*, 19 N. Jersey Eq., (4 C. E. Green) 277.

But the complainants did not allege in their bill the fee to be in themselves, because they believe it to be in the City of St. Augustine, and it is with view to that state of facts in St. Augustine, Pensacola, and probably old Fernandina, that this court must declare the law.

Under the Spanish law the streets of a city were the property of the corporation for the common use of all the inhabitants. They were inalienable. No one could appropriate any part of them to a private purpose, nor “usurp more of the common use and servitude than that to which he was justly entitled, nor disturb any other in the use of it, nor render it less fit for public purposes.” To alter a street, or to take any portion of it for a public use, for it could not be taken for a private use, required the joinder of the King and the municipal corporation, proceeding in accordance with the forms of law, and also, it seems, compensation to adjacent land owners. 4 *American State Papers*, (Gales’ and Seaton’s Edition) 230, 233; *Las S. Partidas* (M. & Carleton’s Translation by Authority of

---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Argument of Counsel.

---

State of Louisiana) Vol. 2, par. 5, title 5, law 15, page 670; Vol. 1, Ibid, par. 3, title 32, law 23, page 447.

The nature of the property in street and commons of the city, and the purposes for which it was held, remained the same, though Florida was ceded by Spain to the United States. This is so evident that it is not necessary to cite cases to that effect, though they could be cited by the dozen.

The commons of St. Augustine, moreover, were confirmed to the city by public act of Congress, the same as used and enjoyed under Spain, with the provision that they shall forever enure to the purposes for which they are granted, and shall not be alienated without the consent of Congress. Act February 8th, 1827, chapter 9, section 3, U. S. Statute at large, vol. 4, page 202. This court will take judicial notice of what was the law of this State when a Spanish province. This has been frequently decided by the Supreme Court of the United States. And under Spain the owner of an adjacent lot, while he did not own the soil of a street, had a right to the free use of it, and to have it unobstructed, and not burthened with any structure injurious to the use or value of his adjacent lot, and that no one should usurp any more than his share of the use of it, to his special injury; and this right of the adjoining owner was a right of property appurtenant to the lot and passing with it. 4 Am. St. Pa., (Gales' & Seaton's Ed.,) page 230, 233.

American law is, as we believe we can show hereafter, the same, as applied to the circumstances of this case.

The right of the owner of land to the use of the adjoining street and to have the street free from any nuisance, or from any new structure, alteration, obstruction or unlawful use, which is of special injury to him or his property, whether he is the owner of the land over which the street

---

---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Argument of Counsel.

---

---

is laid out or not, is as much property as the land itself, and protected by the Constitution, and will be protected by the courts, as any other property, by injunction or otherwise, as the case may require. Cooley's Con. Lim., Mar., p. 545; Lackland vs. North, Missouri R. R. Co., 31 Mo., 180; Haynes vs. Thomas, 7 Ind., 38; Protzman vs. Indianapolis, &c., R. R. Co., 9 Ind., 467; Bingham vs. Doane, 9 Ohio, Hammond, 165, 168; 2 Dill. Mun. Cor., sec. 730, (581,) page 724 and note 1.

“Municipal corporations have no power to give a railway company permission to occupy a public street without express legislative authority; the general control of their streets which is commonly given municipal characters, not being sufficient for this purpose.” Cooley's Con. Lim., Mar., p. 544; Milhan vs. Sharp, 27 N. Y., 611; People vs. Kerr, 27 N. Y., 188; Randall vs. Jack. St. R. R. Co., 19 Fla.; Inhabitants of Springfield vs. Connecticut R. R. Co., 4 Cush, 71.

And unless expressly authorized by the Legislature, a steam railway in a street of a city is *per se* a nuisance. Milhan vs. Sharp, 27 N. Y., 627; People vs. Kerr, 27 N. Y., 188; Randall vs. Jack. St. R. R. Co., 19 Fla.; 2 Dill. Mun. Cor., sec. 722, (533).

If the fee of the street is in the adjoining landowners, as is always presumed unless the contrary is shown, it is their private property and cannot be taken for a private purpose, even under authority of the Legislature, and with full compensation. Where the fee is in the city, it is only in trust for certain uses of the whole public, and any attempt to divert it to private uses or to abridge the free use of it is an attempted breach of trust which will be enjoined by a court of equity upon the application of any one specially injured thereby. Lutterloh vs. Cedar Key, 15 Fla., 306; LeClerk *et al.* vs. Trustees of Gallipolis, 7

---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Argument of Counsel.

---

Ohio, Hammond, 218; Brown vs. Manning, 6 Ohio, Hammond, 298.

It is unnecessary to argue that property, whether the fee of the street or the easement in the free, unobstructed and undiminished use of the street on the side adjoining a man's land fronting thereon, can only be taken under right of eminent domain, if there had been any exercised in this case, by authority of the Legislature for a public purpose, and not for any private purpose. As to what is a public purpose, it is not sufficient that there may be some public benefit, but the use of the road must be public. Cooley's Con. Lim., 530, 531; Mill's Em. Domain, sec. 4.

Thus, the Legislature cannot authorize the laying out of a private road across the lands of unwilling persons, though the road be necessary to the person seeking to establish it, and full compensation to the unwilling land owners be provided. Cooley's Con. Lim., 530, 531; Osborn vs. Hart, 24 Wis., 89; Wild vs. Dieg, 43 Ind., 455; Taylor vs. Porter, 4 Hill N. Y. 140; Dickey vs. Tennison, 27 Mo., 373; 25 Iowa, 540; 34 Ala., 311, and numerous other cases.

But further, having shown that this contract, grant or license is void because the City Council had no authority to make it, it is also void because the railway company have no authority to receive it or to act on it. It is wholly *ultra vires*. The said railway company have no power under their charter to build, maintain or operate one yard of road for a private use. See Charter, McC. Dig., Appendix, p. 1025, sec. 1; also General Incorporation Act, R. R's., McC. Dig., p. 274, sec. 1.

By statute of this State "printed copies of private acts may be given in evidence without being specially pleaded, in any judicial proceeding." McC. Dig., p. 514, sec. 7.

The printed act incorporating this company, contained in McClellan's Digest, was produced to the Circuit Court

---

---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Argument of Counsel.

---

---

and read without objection to show the want of power in the railway company to build or operate a private track, and was considered by the court, although complainant was not obliged to do this as the burthen of showing authority for taking the street was on defendant. When a corporation is attempting to do an act *ultra vires*, any person interested in the corporation, or who would be injured by the act, may have an injunction against the corporation in the premises. Fla., A. and G. C. Co. vs. P. and G. R. R., 10 Fla., 146; High on Injunctions, sec. 412; Field on Cor., sections 264, 273, 408.

The instrument under which appellee seeks to justify is not even made to it, but to the "The Jacksonville, St. Augustine and Halifax Railroad Co." In this sort of grant against public interest as much particularity ought to be required as in a pleading, and the alleged grant here is not to this corporation.

The City Council seeks to grant a perpetuity in this street, or what may be a perpetuity; it is to last until one year after the completion of a certain hotel building not begun, and which may never be completed. This it cannot do. Milhan vs. Sharp, 27 N. Y., 627.

In such a case as this, of continuing obstruction and injurious use of a highway, a party will not have to bring numerous suits for damages; but if there is any particular injury to him he will have his injunction. Milhan vs. Sharp, 27 N. Y., 625; Williams vs. New York Cen. R. R. Co., 16 N. Y., 97, 111; Corning vs. Lawrence, 6 Johns. Ch., 439.

"It is no objection that the wrong complained of constitutes a public nuisance, or that a number of persons are injured, provided the complainants are subjected by it to any special injury." Milhan vs. Sharp, 27 N. Y., 625; Alden vs. Pinney, 12 Fla., 391, 392; Doolittle vs. Supervisors of



---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Argument of Counsel.

---

Broome county, 18 N. Y., 160; Corning vs. Lawrence, 6 John. Ch., 439; Atty. Gen. vs. Nichol, 16 Ves., 338.

Certain Florida cases, it has been claimed by appellee, are against appellants' case. This we cannot see. As we have shown, the leading case of Lutterloh vs. Cedar Key is directly in our favor. 15 Fla., 306. The case of Randall vs. Jack. St. R. R. Co. only decided that the court would not enjoin a horse railway being built under an ordinance of the city authorized specially by act of the Legislature as a common carrier, for the transportation of all persons as passengers; and when the court considered that there was no sufficient danger of serious injury shown. What has that to do with such a case as this? In that case the court says: "If the facts in this case showed extreme probability of irreparable injury to the property of the plaintiffs, or that it would endanger their lives or health, or prove a material injury to the comfort of their existence, this court would be of opinion that the injunction should have been continued till the final hearing." 19 Fla.

Have we not done all this?

In Geiger vs. Filer the court refused to enjoin a mere tramway to a wharf for the transportation of everyone's freight, and the case being principally a dispute about title to property and riparian rights; and in which case all the testimony was to the effect that the tramway was not injurious to complainant, and he having abandoned that part of his case in the court below and declined to make an issue on it. 8 Fla., 325, 333.

In the case of Thebeaut vs. Canova the court decided that it would not enjoin the erection of a steam-mill on the defendant's own land, where there was no probability shown of substantial injury to any one. And at the same time the court declares that it will enjoin a nuisance though on the defendant's own land, if it appears that there will be mate-

---

---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Argument of Counsel.

---

---

rial injury to the comfort of those who dwell in a neighboring house. 11 Fla., 143, 171.

In Alden and Wife vs. Pinney the court decided that it would not enjoin the erection of an ice-house in the waters of Pensacola bay, where a wide street intervened between the lot of complainant and the ice-house, and he did not show any danger of any injury to him or his property at all. And the court said that if he had shown any special and serious injury to him he could have had his injunction. Alden vs. Pinney, 12 Fla., 391, 392.

This court has decided in many cases that notwithstanding the answer denies the allegations of the bill, (which this answer does not) that if there is a strong presumption that the complainant may prove entitled to relief on final hearing, or if there is a reasonable doubt in the matter as to whether upon the answer the injunction ought to be dissolved, it will be retained until the final hearing. Allen vs. Hawley, 6 Fla., 142; Carter vs. Bennett, 6 Fla., 214; Young *et al.* vs. McCormick, 6 Fla., 368; Linton vs. Denham & Palmer, 6 Fla., 533; City of Apalachicola vs. Ap'l'a Land Co., 9 Fla., 340.

To assist the court in the discretion with which it is vested as to whether it will, on answer, dissolve injunction or not, and especially where there are allegations of irreparable injury in the bill, the court will hear read, before or after the answer is filed, affidavits in support of the injunction which may contradict the answer, and the court will give them due weight in its decision. Poor vs. Carleton, 3 Sumner, 83; 3 Dan'l Chan., p. 1768, note 2; Peacock vs. Peacock, 16 Vesey, 49; Morphett vs. Jones, 19 Vesey, 350.

Such has always been the practice in Florida.

In this case the affidavits in support of the bill and restraining order were read and filed without objection; they

---

---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Opinion of Court.

---

---

are, as they show, by free-holders of St. Augustine; give facts, and are unusually respectable, strong and numerous, and ought to have much weight in the cause.

*Jno. T. & Geo. U. Walker* for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The bill in this case was filed by the appellants, Garnett and wife, setting up that the present terminus of the Jacksonville, St. Augustine and Halifax River Railway Company was at the head of the shell-road leading north of the gates of St. Augustine and about the line of the city limits; that said company is building their road into the city limits and intend to lay the said railroad on the side of a street next to the property of plaintiff, Mary J. Garnett; and that they propose to operate their road with steam locomotives; that "she is the owner and seised in fee simple of a large piece or lot of land within the city of St. Augustine, and having an extensive front on said street on which it bounds on the east for about nine hundred feet; that your orators reside on said property adjacent to said street and that they have divided and platted said land into lots for buildings and residences and for sale; that the said piece of land cost Mary J. Garnett \$8,000 last winter," the winter of 1882; that said street "is one of the most public and most used for driving and walking in said city of St. Augustine, and the only wide street in the city; that said railroad is about to run right along and upon said street, taking a great portion thereof nearly its whole length for about a mile and that the said railway thereon will be a great public injury and nuisance, and particularly to your orators, \* \* \* that said street or avenue is the only pleasant and attractive drive near St.

---

---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Opinion of Court.

---

---

Augustine, and is so used by the population of said city and visitors thereto, and is therein a great public resort for health and pleasure; that it is also a portion of the city rapidly improving, has many residences on each side of it and some very handsome villas; that the chief value of the property along said street is by reason of the handsome drive, which is shelled, as residence property; that by the building of said railway down said street, road or avenue the same will be utterly spoiled as a drive and as a residence street, horses will be frightened, vehicles damaged, property, life and limb endangered, and the adjacent property will be greatly and irremediably injured in value, and your orators will be greatly and immediately and irremediably damaged in the premises; that they have to go to the business part of the town, by reason of the distance, in a conveyance drawn by a horse, and further, that they have a family of small children, and that said railway in front of their door will endanger the lives of their family; that the proposed line of the railway to be built on said street is not a part of the main line of said railway, is not a part of its line of public transportation, is not on the line or its right of way to its depot, is not demanded by any public necessity or convenience, but is only a branch, switch or spur, thrown out for about a mile on this public street; that said company pretend that they have permission from the City Council to operate a railway on said street for one year and that they are building the same to carry materials for a projected hotel."

Plaintiffs allege that the true intention of the said company is to get down their rail and maintain it then perpetually; that there is no necessity to keep said railway on said street for a year to transport material for one year.

Plaintiffs pray a perpetual injunction against the con-

---

---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Opinion of Court.

---

---

struction and operation of the road by the company so far as it “would run in front of their property.”

Upon the filing of the bill a temporary injunction was granted.

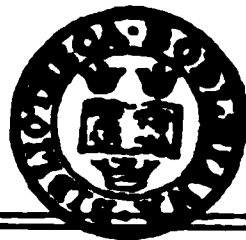
The defendant answered admitting that it intended to construct a railway or track along the shell-road mentioned, on the side of the road next to the property of complainant, and that it intended to operate it with steam locomotives, but denies that it intends to lay the track on the part of said road which is shelled, or so as to obstruct that part of the road ordinarily used for drives, or in any way to obstruct the side-walk.

Defendant also admits all the allegations of the complainants’ bill touching the nature of the shell-road, except that it is the only pleasant and attractive drive near St. Augustine. It admits that this portion of the city is rapidly improving, and that complainants have divided and platted their lands as they allege.

Defendant denies that by the laying of the said railway the property of defendant will be injured in value, or that the operation of the road will endanger the life, health or comfort of the plaintiffs, or the members of their families, to any greater extent or in any other way than does the building and operating steam railways generally through inhabited regions.

Defendant makes the following exhibit to the answer:

“*Resolved*, That the Jacksonville, St. Augustine and Halifax Railroad Company be and are hereby permitted to lay a temporary side-track or switch from the north end of the shell-road, the present southern terminus of said railroad, to the site of the new hotel soon to be erected near the old city for the purpose only of delivering lumber and other freight for the erecting and completion of said hotel, such side-track or switch to be parallel with the shell-road



---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Opinion of Court.

---

and between the said shell-road and the side-walk on the west line thereof, to be so constructed as not to obstruct the side-walk or roads and to be removed by said railroad company within one year from date thereof; that the said railroad company shall keep in good repair the several crossings in front of residences along said road, and not to allow trains to be run at a greater rate of speed than six miles per hour.

“Passed in council at special meeting.

“JOHN G. LONG, President.

“July 20, 1883.”

The above resolutions are entirely satisfactory and agreed to by the J., St. Aug. and H. R. R. Co.

A. M. LYON, President.

By H. S. MING, Superintendent.

It is admitted that this resolution was passed by the City Council of the City of St. Augustine.

And defendant avers that it intends to construct and operate the said railroad in strict conformity to and compliance with all and singular the terms and conditions of the said resolution and not otherwise.

It denies all statements of the bill to the effect that it intends to construct or operate said railway upon any other route, in any other mode, or for any other purposes than is declared and prescribed in said resolution and denies all allegations in the bill to the contrary.

It denies that the construction and operation of the road in the manner and for the purposes stated would prevent the sale of the lots of the complainants or would be a public nuisance.

Upon the coming in of the answer, the injunction was dissolved, the plaintiffs submitting affidavits of several persons setting up, so far as plaintiffs are concerned, nothing

---

---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Opinion of Court.

---

---

stronger in support of his equities than he has himself alleged.

In all bills for injunction to prevent threatened nuisances, both the character of the nuisance, as well as the nature of the injury that will result therefrom, should be clearly set forth. For this reason these affidavits, which the statute authorizes, so far as they go to show the probable result of the construction of this road as to the property of the persons making them, are admissible only as showing that the act threatened, if accomplished, would be a public nuisance. They are entirely irrelevant when considered with reference to the matter of special damage to plaintiffs. The equity of the plaintiff here depends upon the injury threatened to her property, not to that of her neighbors.

From this order dissolving the injunction this appeal is taken, and the granting of this order is the ground of appeal set forth by appellants in their petition of appeal.

We have stated the contents of the pleadings more fully than usual in this case as the respondent, the railroad company, insists that the plaintiffs have failed to do more than to state that the threatened act which they seek to restrain is the construction upon this street on the side next to the property of the plaintiffs of an ordinary surface railroad, the motive power of which is to be steam, and that the general allegations of irreparable injury and other allegations of the same character in the bill, cannot be made the basis of the action of the court. What is the rule as to the contents of a bill in such case and the manner of setting forth the character of the nuisance and the nature of the threatened injury? In the case of *Thebeaut and Glazier vs. Canova*, 11 Fla., 173, which was a bill to enjoin the erection of a steam mill upon the ground that it would be a nuisance, this court

---

---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Opinion of Court.

---

---

said “the court must act upon facts and not opinions, and these facts must clearly show that the plaintiffs are entitled to the relief asked.” Now the only fact here set forth as to the nature of the acts complained of is that what is threatened is the construction of a steam railway on the side of a street at a place where the plaintiff, Mary J. Garnett, is an abutting proprietor. It is not alleged that the railway threatened to be constructed is other than an ordinary surface railway to be operated by steam.

The general rule is that injunctions against threatened nuisances will not be granted except in extreme cases where the threatened use of property or the act sought to be restrained is clearly shown to be such as leaves no doubt of its injurious results, such results as are recognized to be substantial legal injuries. The bill must set forth such a state *of facts* as leaves no room for doubt upon the question of nuisance, for if there is any doubt upon that point the benefit will be given to the defendant. Mere allegations of conclusions or opinions as to the contemplated injuries are not sufficient. The precise manner in which he is to be injured must be stated.

We will not stop to discuss the question, but will simply say that it is the settled law here and elsewhere that an individual cannot recover damages at law, or have relief in equity, against even an admitted public nuisance unless he makes a case of special and particular injury to himself. He must sustain an injury not common to the public.

The gist of the action, the gravamen of the complaint, is the special and particular injury. For the common injury there can be no redress, save by some authorized action in behalf of the people. In all cases where an individual seeks to enjoin a threatened nuisance, he must, in his bill, set forth the character of the nuisance distinctly. He must also set forth particularly the character of the injury that will re-



---

---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Opinion of Court.

---

---

sult therefrom to him. Now all that is set forth in this bill as to the character of the nuisance is that it is a steam railway to be constructed on the surface of a street running in front of plaintiffs' property. Such a structure is not now held to be a nuisance. Indeed, in some of the States it is denied that its construction imposes an additional burden so as to give the abutting proprietor a right to compensation. As to the character of the injuries which plaintiffs apprehend will result here they are only such as would attend the construction of a steam surface railway according to approved modern method and custom. "When a railroad is built under legislative authority and the charter or law under which it is built authorizing the laying of its track on a street, unless the road is negligently constructed or operated, neither the obstruction of the street nor the soot, jarring or danger resulting therefrom makes it either a public or private nuisance." Wood on Nuisances, 75; Rand vs. The Pacific Railroad, 65 Mo., 325; Danville, Hazelton and Wilkesbarre Railroad Co. vs. The Commonwealth, 73 Penn. State, 29; Fletcher vs. Auburn and Syracuse Railroad Company, 25 Wend., 464.

It is insisted, however, that this road is being constructed without legislative authority in that it is to be used for a private purpose, to wit: the transportation of material for the construction of a hotel, and plaintiffs allege also "that it is not a part of the main line of said railway; is not part of its line of public transportation; is not on the line of its right of way to its depot; is not demanded by any public necessity or convenience; but is only a branch, switch or spur thrown out for about a mile on this public street by said railway company for its own convenience." The authority under which it is to be constructed is a resolution of the City Council of St. Augustine. This allegation of the

---

---

Garnett et ux. v. J., St. A. & H. R. R. Co.—Opinion of Court.

---

---

bill is not denied. On the contrary, the defendant justifies its action under it.

The first question which arises here is whether the City of St. Augustine, through its Council, has authority to grant the right as against an abutting proprietor to thus construct a steam railway upon one of its streets. Under its charter it has nothing more than the ordinary power to establish, open and regulate its streets. It has no express power to authorize the construction of a steam railway or any other than the ordinary power in municipalities as to the streets and commons within its local jurisdiction. So far as the title is concerned it is presumed from the allegation of abutting proprietorship that the fee to one-half of the street is in the owner of the lot adjoining and bounded by the street. The construction of the road is, therefore, without authority either from the State, through the legislative branch of the government, or from the municipal corporation. Unquestionably this is a public nuisance. It is unlawful and there is no doubt that it may be made the subject of proper proceedings to abate it at the hands of the State in the local jurisdiction in which it is situated. I can find, however, no authority for the conclusion which I would like to reach that an abutting proprietor under the allegations of this bill as to the character of the contemplated structure has a right to enjoin its threatened construction even though it be a railway unauthorized by law. The question of compensation for property taken, if there is a taking threatened here, is entirely distinct from the right to enjoin the construction of a railway. One permits its construction and makes compensation for a contemplated taking of property, the other denies the right to construct, enjoins it and prevents its existence. One requires pay for what is done, the other prohibits its being done. with or without pay.

---

---

Deans v. Bowden and Spratt—Syllabus.

---

---

The abutting proprietor here has the fee to the middle of the street, but his right, title and interest as against the public so long as it remains a street is a right of way in the street and a right to its continued use as a street.

The authorities sustain the proposition that even though the contemplated railway be a public nuisance as unauthorized by law the abutting proprietor has no right of action if the structure contemplated is an ordinary surface railway operated by steam upon a street in front of property owned by him. The structure here threatened is not alleged to be other than an ordinary surface railway operated by steam, and while there is conflict of authority as to whether there is a *taking* of property as distinct from an *injury* to it in such case, yet as to the question whether it is a nuisance, abatable at the hands of an individual, the authorities seem to be uniform in announcing that he has no such right.

The order of the Circuit Court dissolving the injunction is affirmed, and the case is remanded for further proceedings.

---

GEORGE WHEATON DEANS, ADMINISTRATOR, APPELLANT, VS.  
URIAH BOWDEN, SHERIFF, AND LEONIDAS W. SPRATT,  
APPELLEES.

A person in quiet possession of real estate as owner, may obtain an injunction to restrain others from dispossessing him by means of process growing out of litigation to which he was not a party.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

---

Deans v. Bowden and Spratt—Argument of Counsel.

---

*Geo. Wheaton Deans in pro. per.*

*John T. & Geo. U. Walker* for Appellees.

The only reason assigned by the complainant why equity should arrest the process for restoring to him this possession, are: 1st, that he is *at the time of filing the bill* in the quiet possession; 2d, that he holds such possession as administrator, &c.; 3d, that the property is part of the estate of his intestate; 4th, that he was not party to the suit in which the judgment sought to be enforced was rendered, and 5th, that he took possession solely as administrator and not by, through or under said Greeley, the defendant in judgment, nor by his permission or connivance.

It is not stated when or how the complainant took possession, or how or by what title he claims the right to hold possession.

It does not appear that the restitution of Spratt would create any cloud on complainant's title if he has any, impair his power to administer the property if indeed it be true that it belongs to the estate, or that it will cause a multiplicity of suits, or that any fraud has been practiced by Spratt, or that he is in anywise seeking to make an inequitable use of legal process.

A party seeking to be protected by injunction in the possession or enjoyment of real property must show a right by something more than a mere assertion that it exists; and it must upon the facts alleged appear to be such a right as the court will feel bound to protect on his own showing against the act of the defendant. There must be a clear and satisfactory showing of a right superior to that which it is sought to restrain. *Outcolt vs. Disbrough*, 3 N. J., Eq., 216; *Hamilton vs. Adams*, 15 Ala., 596; 1 High. on Injunc., 2d Ed., §§340, 355, 359, citing *Hamilton vs. Hendrix Heirs*, 1 Bibb, 67; *Tevis vs. Ellis*, 25 Cal., 515.

---

---

Deans v. Bowden and Spratt—Opinion of Court.

---

---

The right of Spratt to be restored to the possession of which he was forcibly deprived is not even at all inconsistent with any of the allegations of the bill.

The complainant ought at all events to be required to state a case upon which if Spratt be restored to the possession he could recover it back from him. *McGee vs. Smith*, 16 N. J. Eq., 463.

MR. JUSTICE WESTCOTT delivered the opinion of the Court.

In this case Spratt sued Greeley in forcibly entry and unlawful detainer of the premises. He obtained judgment of restriction at November term, 1882, of the Circuit Court against Greeley, and had a writ of *habere facias possessionem*. The bill is by Deans, who alleges that he was appointed on the 16th of February, A. D. 1881, administrator *de bonis non* of the estate of Jacob Foreman, deceased; that the estate is still unsettled; that as such administrator he is in the quiet and peaceable possession of a room embraced in the *habere facias possessionem*, which is a part of the estate he represents, and that the sheriff threatens to dispossess him by immediate execution of the process; that to said suit he was no party, or any wise in privity; that he took possession solely as administrator as aforesaid, and not by, through or under the said Greeley, nor by his permission or connivance.

A temporary injunction against execution of the process was granted upon motion of Deans, which was afterwards dissolved upon motion of Spratt. From this order dissolving the injunction Deans appeals.

“A person in quiet possession of real estate as owner may obtain an injunction to restrain others from dispossessing him by means of process growing out of litigation to which he was not a party.” Here Deans disclaims any con-

---

---

Walker et al. v. Drew et al.—Statement of Case.

---

---

nivance or privity with Greeley. If Deans had, as he alleges, an honest possession when the execution of the writ was threatened it is impossible that he, a stranger, could be bound by the proceedings between Spratt and Greeley.

The following authorities are to the point involved: Daniel Chy. Plead. and Prac., §1624; Kerr on Injunctions, 583; High on Injunc., §357; Banks vs. Parker, 80 N. C., 157; Goodnough vs. Shepard, 28 Ill., 81.

We have read with attention all the cases cited by respondent except the case from the 15th of Alabama, which book we have not been able to find. These cases are not applicable here. Most of them are contests between parties to the suit in which the writ issued or those holding under them.

The order dissolving the injunction is reversed and the case will be remanded for further proceeding consistent with this opinion and conformable to equity.

---

JOHN T. WALKER ET ALS., APPELLANTS, VS. GEORGE F.  
DREW ET ALS., APPELLEES.

1. A surety for a debt of a deceased intestate, the debt being due, has a provable claim against the estate.
2. In the absence of a legal personal representative of a deceased intestate a creditor of such intestate has no equity to have a receiver appointed to collect the assets and administer the estate; this, in a suit by such creditor against an alleged wrongful executor, a creditor of the intestate, and a debtor to the intestate.

Appeal from the Circuit Court for Duval county.

Plaintiffs, respondents, Drew, Bowden, Dzialynski and Buckman, file their bill in chancery, and allege substantially that H. B. McCallum, in his lifetime, and on the

---

---

Walker et als. v. Drew et als.—Statement of Case.

---

---

20th of January, A. D. 1881, executed a promissory note to S. B. Hubbard for four hundred dollars, payable one year after date, and that they joined in the execution of said note with him; that while in form the note is a joint note, they were, in fact, sureties, the money being borrowed by him and for him; that this money he used about a publishing and printing company, alleged to a corporation, in which printing and publishing business he was then engaged; that the said McCallum was the owner of all the stock, property, business and effects of said printing establishment, the business of said establishment being the publication of the daily and weekly *Florida Union*; that about the 27th of January, A. D., 1883, the said H. B. McCallum sold all of his said printing establishment, stock, effects and type, to defendant, Charles H. Jones, for the sum of twelve or fifteen thousand dollars or more; that said McCallum received in cash about five thousand dollars, and "six thousand or nine thousand five hundred or more dollars" in notes secured by mortgage for the balance of the purchase money; that McCallum died on the 29th January, A. D. 1883, leaving a balance of about \$300 due on said note to Hubbard; that his widow, Elizabeth H. McCallum, survived him; that immediately upon his death John T. and George U. Walker, without legal authority as administrators or executors, possessed themselves of all the property of the said McCallum, publishing a notice in a public newspaper calling upon all persons indebted to McCallum to make prompt payment to them, and calling upon all creditors of McCallum to present their claims to them; that as such creditors the plaintiffs presented said note, but that notwithstanding frequent applications for payment they have been unable to collect it; that John T. & George U. Walker have collected a large amount of the assets of the estate and have paid some of the debts.

---

---

Walker et als. v. Drew et als.—Statement of Case.

---

---

Plaintiffs aver upon information and belief that in addition to large sums paid out by said defendants on the debts of the deceased the sum of \$7,000 has been paid out of the purchase money of said property, assets of the estate, but to whom said payments were made they do not know, except that they are informed that one Winburn J. Lawton received several thousand dollars of the same; that the said Lawton was entitled to no priority as against plaintiffs, nor were the other creditors, to whom payments were made, entitled to any priority.

The plaintiffs allege that there should still remain, as assets of said estate, the sum of five thousand dollars, or more, the balance of purchase money of the printing establishment, which McCallum sold before his death, secured by mortgage, and other large sums of money, assets of said estate, and that there is a sufficient amount of assets to pay their claim, if a proper and judicious management or administration of the assets of said estate be had and immediate steps are taken to secure the same.

Plaintiffs allege that a part of the purchase money, being the sum of \$6,500 of said property sold by said McCallum to said Charles H. Jones, now appears of record in notes, secured by mortgage on the same property in the name of E. H. McCallum, widow of H. B. McCallum; that said notes are signed by Charles H. Jones, and bear date January 31, 1883; that they are informed and believe that the said E. H. McCallum was not possessed of means to purchase said notes, and aver that the said notes and mortgage are properly a part of the estate; that the debts due in the said printing business and "the record claims and liens against said H. B. McCallum, or his said estate," did not exceed in all the sum of \$5,000; that the debts of the printing business did not exceed the sum of three or four hundred dollars; that this sum was due the employees of the



---

---

Walker et als. v. Drew et als.—Statement of Case.

---

---

printing establishment; that the said defendants, John T. and George U. Walker, “now claim to know nothing of said estate, or the assets thereof, or to represent the same”; that while they have thus managed the estate, they have given no bond for the application of the assets of the estate, and unless some order is given for the security of the plaintiffs their claim will be endangered, if not lost; that the mortgage notes aforesaid and other securities “received as part payment of such purchase money are negotiable and may be, if they have not already been disposed of, and the claim of your orators defeated, a part of said purchase money already appearing, as aforesaid, now of record in notes, secured by mortgage upon the same property in the name of the widow of McCallum, in the sum of \$6,500.”

Plaintiffs aver that the widow of McCallum was not possessed of means to have purchased the said mortgage notes, and that this debt was a part of the assets of the estate.

Plaintiffs pray that defendant, Charles H. Jones, may be enjoined from paying said notes and mortgage, or any part of the debt due, or to become due to H. B. McCallum, to John T. and George U. Walker, or any other person except by order of the court; that a receiver be appointed to take charge of all the assets of the estate of H. B. McCallum, he to control, keep and dispose of them under the direction of the court; that the note and mortgage for the sum of \$6,500, given by said Jones to the widow of said McCallum, may be decreed to be a part of the assets of his estate, subject to the claim of plaintiffs; that the said widow may be enjoined from any disposition or control of the same; that the said Hubbard may be required to present and prove his said claim before a master of this court; that upon such proof the amount of said claim may be immediately paid and satisfied in full out of the effects of the estate. There is a prayer for alternative relief.

---

---

Walker et als. v. Drew et als—Argument of Counsel.

---

---

The defendants interposed a demurrer to this bill, which being overruled, they enter their appeal to this court. The general ground for reversal assigned is the overruling the demurrer.

A. W. Cockrell for Appellants.

The equity of the bill was assailed by the demurrer, and the action of the court overruling the demurrer is here the basis of the petition of appeal.

Brief. The court should have sustained the demurrer:

1. It is the settled rule in equity, if a person wants relief, touching the personal assets of his debtor, he must show he has taken out *execution at law*. Brenkerhoff vs. Brown, 4 Johns. Chy., 676.

2. Persons intermeddling with a decedent's estate are liable to the executor or administrator, only. Scriven vs. Bostwick, 2 McCord's Chy., 410; s. c., 16 Amer. Decis., 664.

3. As all the creditors of H. B. McCallum are equally interested in his estate, no decree can be rendered in this cause without drawing the whole estate, and its administration into this chancery case. Thompson vs. Brown, 4 Johns. Chy., 639; Scott vs. Wolf, 64 Ala., 182.

4. If the estate is to be administered, the 'executor *de son tort* being before the court will not dispense with the presence of the regular representative; the executor *de son tort* is only treated as executor for the purpose of being charged, not for any other purpose. Williams on Executors, pages 1727, 2016, 2128, and the cases therein cited; Garner *et al.* vs. Gant, 19 Ala., 668.

The conclusive answer to the bill is, that the title to the assets sought to be appropriated to the payment of the note, not being before the court in the person of the rightful representative, he could not be bound by the decree which the

---

---

Walker et als. v. Drew et als—Argument of Counsel.

---

---

court might make touching the assets of the decedent. Upon his appointment, he is clothed, by the action of the only court constitutionally competent to grant letters, with the title to all the assets which were of the decedent *at the time of his death*, and hence he could recover the assets notwithstanding the disposition sought to be made of them by the Chancery Court prior to his appointment.

There is no such thing as an executor "*de son tort*" under our system. 17 Arkansas, 122, 129; 11 Kansas, 214; 50 Cal., 388.

As to whether an executor *de son tort* may be sued at law, and not in equity, see Campbell vs. Shelton, 13 Pick., 8, 22, 24.

*H. H. Buckman* for Appellees.

George F. Drew *et als.*, complainants in the lower court, file their bill as sureties of one McCallum, deceased, on a promissory note, against Walker & Walker *et als.*, to establish their claim to relief, obtain an account and discovery of assets and a payment of the debt for which they are sureties, and thus release them from liability on the same.

A surety may come into equity to compel the principal to pay the debt and relieve him of his liability. 12 Fla., 329; 1 Story's Eq. Jur., §§327, 639, and note 2.

Even though the debt has not been paid by him, or suit commenced against him by the creditor, sureties, right to relief arises upon default of the principal to pay at the time of maturity of the debt. 1 Vol. Amer. Decis., 48 page, and page 630; 1 Root, Conn., 201; 12 Fla. Rep., 329.

The debt for which appellees are sureties was a debt of deceased principal and due by him.

All debts due by testator are debts due by executor, and the executor is liable in his representative capacity to all equitable demands which existed against deceased at time of his

---

Walker et als. v. Drew et als—Argument of Counsel.

---

death. 5th Ed., (American,) Wms. on Executors, 2 Vol., 1557, 1559, 1819.

Sureties are creditors in equity, their right to relief arising upon default of principal to pay, their *only* remedy is in this court to compel payment of the debt. 16 Fla., 519 to 529, &c.; 12 Fla., 329; 4 Des., 45, 227.

An executor *de son tort* is one who is without proper authority of decedent, or Ordinary, doth such acts as belong to the office of executor or administrator, *such* as having assets in his hands at time of suit against him, paying debts of deceased out of assets, receiving debts due him, demanding debts due and the like—very slight circumstances necessary. 3 Bacon, 21, 22; 2 T. Rep., 97; Williams Ex., 5 Amer. Ed., 1 Vol., 224, 225; Ibid, 227, 232 and note U.

When one has so acted as to become in law such executor, he renders himself liable to actions, not only by the rightful executor or administrator, but also to be sued by creditors, legatees, &c., of deceased.

He has all the liabilities and none of the privileges of rightful executor. 1 Wms. Ex., 231; Blackstone Com., (Chase,) 605; 2 T. Rep., 97 and 597; 3 T. Rep, 581.

In actions by a creditor against him he shall be named executor generally, and the same judgment may be obtained against him as against other executors; that debts and costs be paid out of assets of estate in his hands. 3 Bacon, 25; 1 Mod., 208; Blkst., by Chase, 605; 2 Mod., 51; 2 Blkst., 507, 508; Wms. Ex., 231, 232 and note 3, 233 and note 3.

All lawful acts he doeth are good, and he is allowed in equity all payments as were incumbent on rightful executor to make. Wms. Ex., 1st, 232-3; 3 Bacon 25 and 26.

Such executor liable only for assets is he show correct ad-

---

---

Walker et als. v. Drew et als—Argument of Counsel.

---

---

ministration, but least irregularity will charge him personally. 3 Bacon, 25.

Whether he be such executor or not is question of law. 3 T. Rep., 99.

He is so named to distinguish him from others, there being several kinds. He is nevertheless *executor* and the law casts upon him those duties and liabilities that others derive from the will or letters because of his own acts.

When the contract is that the *principal* shall pay a certain debt at a time specified, the surety can have an action when the *principal defaults* even *before* he is called upon to pay as surety. Perry vs. Foy, 8 B. and C., 11; Mease vs. Mease, Cowp., 47; Evelyn vs. Evelyn, 2 P. Williams, 659; Loosemore vs. Redford, 9 M. and W., 657; Russell vs. LaRouge, 11 Ala., 352; Post vs. Jackson, 17 Johns., 239; Wright vs. Wright, 4 Barb., 235; I Ohio, 534; Stump vs. Rogers; Washington vs. Jait, 3 Hump., 534; Bishop vs. Day, 13 Vt., 81; Ramsey vs. Gervas, 2 Bay., 145.

Above cases referred to in note 1 American Decisions, page 48, and the same volume, page 635.

Demurrer

To first ground. Statute does not prohibit suit before six months. McClellan's Digest, p. 84, §28.

To second. Sureties are entitled to sue in equity to obtain relief though they have not paid the debt. 12 Fla., 329.

To third. Bill does *allege*. Sompany was *not* a partnership. Not a legally organized corporation, or if so, was dissolved and why. Shows indebtedness.

To fourth. Bill does not seek administration of estate. But only an establishment of their claim, discovery and protection of assets and payment of debt. Bill makes executors *de son tort* parties who are sufficient representatives. Demurrer admits their possession of assets. Demurrer

---

---

Walker et als. v. Drew et als—Argument of Counsel.

---

---

should show who representative is, if they are not. Story's E. Pld., 238, §543; Dan'l Chan., 288, 555, note 1.

To fifth. All parties in possession of assets. Debtors of estate and all liable to account thereto proper defendants where found. Waste insolvency. Want of responsibility and misappropriation of assets shown. S. Eq. Pld., secs. 178, 224, 227, 229, 232, and note; 1 Dan'l Chy., 323, 324, and note; Story's Eq. Jur., sec. 423; William E., 1832, 1833 1831; and note A. Improper joinder can only be taken advantage of by improperly joined parties. Story's Eq. Pld., 237, and note 4, 544.

To sixth. Sureties entitled to all equitable liens on property of principal. 12 Fla., 324. Bill shows money was used in business and helped produce or save assets. Debt is admitted. As debt against deceased it survives as debt against estate. Not necessary to enforce claims against estate that lien by judgment or otherwise be shown. 4 Fla., 77, 78.

To seventh. Bill makes those who have possession of assets defendants, charges acts showing them executors. Law fastens upon them liabilities for their voluntary acts. They are protected in equity in all lawful acts, even if not, cannot have relief to creditors' prejudice. Story's Eq. Pld., 179; 3 Bacon, 26.

To eighth. They are sufficient representatives of estate and protected in all lawful acts. Decree or judgment against executor *de son tort* is that plaintiff recover debt and costs out of assets of estate. 1 Wms. Ex., 231, 332; 3 Bacon, 25, note 3.

To ninth. Husband cannot be made plaintiff as relief asked against him, and if not he is the only person who can complain. S. E. Pld., 237, and note 4.

Executors in equity are considered trustees, and assets trust fund and equity will compel account of them and pro-

---

---

Walker et als. v. Drew et als—Argument of Counsel.

---

---

tect them, as of any other trust fund. Executor *de son tort* considered trustee in equity. 1 Des. Eq. Rpts., 214; Williams' Ex., 1819, 1820; Story's Eq. Jus., 541, 579.

Court will appoint receiver where executor insolvent misappropriates assets, waste, misconduct, &c., shown. Wms. Eq., 205, and note; 1844, and note 1; 1 Sty. E. Jus., secs. 541, 828, 836.

If plaintiff entitled to relief, though not to discovery, demurrer bad. S. Eq. Pld., 548.

If title to relief shown, discovery compelled. S. Eq. Pld., 551.

Even if demurrer good to relief, it is not a bar to discovery, and bill will be maintained. S. Eq. Pld., 441, 312, 546.

We ask that our claim be established and a discovery of assets had, and the same protected and saved, and decree of payment of the debt out of same, or at least that our claim be established, and for a discovery and protection of the assets for the payment of said debt in course of administration, and pray that decree of lower court be affirmed, and for such other relief as this court deem meet.

Bill shows the possession of assets and appropriation of same, and no authority for holding them, no account or statement of assets filed or shown by them. Bill shows our claim against those assets, and we submit the creditors' right to call them to account and ask the interposition of equity to protect the fund.

Acts which destroy the end for which a corporation was created are a surrender of its corporate rights and powers and a dissolution of same. Field on Corporation, 556, 494, note; Am. Dcs., 10 Vol., 273; 20 Vol., 122, 119; 26 Vol., 111; 33 Vol., 660; 2 Kent, 311, 312; U. S. Dgst., 1st Series, Vol. 8, 726, §2072.

---

---

Walker et als. v. Drew et als.—Opinion of Court.

---

---

MR. JUSTICE WESTCOTT delivered the opinion of the court.

An analysis of this case presents a bill by sureties of a deceased intestate against three parties alleged to be intermeddling with his estate, and with having custody of the assets thereof without lawful authority, these three persons being John T. Walker, George U. Walker and Elizabeth H. McCallum, the widow of the deceased, the allegation against Mrs. McCallum being that she is improperly in possession of or controlling an asset of the estate, a debt to the estate by Charles H. Jones, and a creditor of the deceased alleged to have received payment of his claim when not entitled to any priority as against plaintiffs.

No relief is prayed against this satisfied creditor, and we do not see how there could be as the payment of his debt was precisely the thing which plaintiff himself seeks here, he being no more than a simple creditor.

There are sufficient assets remaining to pay the sureties' debt "if a proper and judicious management or administration of the assets of said estate be had and immediate steps are taken for the benefit thereof."

Giving the surety here the standing of a creditor of the deceased intestate, principal, and we think he certainly has a provable claim against the estate, the debt of the principal being due and unpaid; what are the equities attached to that relation as applicable to the subject matter of this suit? Where is the equity of the creditor here to have a receiver appointed to administer this estate? Whatever may be the liability of a person, who, without lawful authority, either as executor or administrator, converts or collects assets of the estate to the legal administrator or personal representative, or to a creditor, this wrongful executor has no authority to collect the debts. He is not enti-



---

Walker et al. v. Drew et al.—Opinion of Court.

---

tled to an action, has no right to reduce assets and his own liability is substantially founded upon tort.

Again, the creditor of an intestate estate has no direct action against its debtors to appropriate the debt to the satisfaction of his claim. If he attempts this he becomes himself *pro tanto* an executor *de son tort*, if there be such a thing as an executor *de son tort* in Florida. Besides he can be entitled to no particular priority against any debt under our statute. He has no lien if he gets a judgment, not being one of the claims to which the statute gives priority. It follows, therefore, that neither an executor *de son tort*, if there be such a relation in Florida, nor a creditor, nor each combined have an equity to sue for and recover the debts due an intestate estate or to control the debts of such estate. If this be so, and that it is so we have no doubt, where is their equity to have a receiver to do these acts? We are entirely satisfied that a creditor cannot maintain such a bill as this. What kind of a bill he can maintain, and what are his rights against an intermeddler for assets in his hands or illegal administration or appropriation of those collected by him, is a question which does not arise here.

The order overruling the demurrer is reversed and the case will be remanded with directions to allow the demurrer and dismiss the bill without prejudice to any other proceeding in equity or at law which plaintiffs may institute, or for any relief different from that sought to be had in this case.

---

---

Marks v. Elizabeth R. and Mary G. Baker—Opinion of Court.

---

---

M. R. MARKS, APPELLANT, VS. ELIZABETH R. AND MARY  
G. BAKER, APPELLEES.

1. A deed of land will not be annulled because of the failure to pay all of the purchase money. A remedy in equity may be to subject the land as for an equitable lien for the unpaid balance.
2. In a suit upon a contract made with a party since deceased, his legal representatives are necessary parties.
3. When a decree *pro confesso*, regularly entered, has become absolute, the complainant is entitled to such relief as may be had upon the facts stated in his bill, and the decree *pro confesso* should not be set aside upon mere motion; but if the bill shows no ground for relief and the court sets aside the decree *pro confesso*, complainant cannot, on appeal, reverse the order setting it aside, as he has no equities, but his bill should be dismissed without prejudice.

Appeal from the Circuit Court for Orange county.

The facts of the case are stated in the opinion.

*D. F. Hammond* for Appellant.

*W. R. Anno* and *Alex. St.-Clair Abrams* for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

Marks, in April, 1882, filed his bill against the respondents as executresses of the last will and testament of Bolling Baker, deceased, and as heirs at law of said deceased.

It is alleged that he entered into an agreement with Baker whereby in consideration of certain services to be performed by Baker as an attorney at law he paid him \$120 in money and gave him his note for \$100, and conveyed to Baker's daughters, who are the executresses under Baker's will, ten acres of land, the consideration being expressed in the deed of \$500; that Baker performed a part of the services under the said agreement, and died, leaving a large

---

**Marks v. Elizabeth R. and Mary G. Baker—Opinion of Court.**

---

part of the services which he had undertaken under the agreement unperformed, and defendants as his representatives have not provided for the completion of the legal services; that they hold the note of \$100 and insist on its payment, and hold the title to said land. He prays an injunction to restrain them from selling the land, and a decree that an account be taken of the value of the services rendered under the agreement by Baker, and whatever sum is due on such account from complainant be made a charge upon the land, and that on payment of the amount the deed of the land be annulled, because of the failure in part of the consideration as stated, and for such other relief &c., as may be had.

The subpoena was returnable on rule day, May 1, 1882. On April 15, 1882, complainant amended his bill by striking out the words charging defendants as executresses, and striking out the words "executrix" and "heirs" wherever they occur, "and also all words, sentences and phrases showing any right withheld or actions performed as heirs or representatives of said estate," and inserting in lieu thereof "defendants in their own right." A further amendment charges that at the time of the agreement and execution of the deed it was agreed between Bolling Baker and complainant that "Baker would accept said land as a residence for himself and family, and in the event he changed his mind and should fail to do so, that he would accept the consideration price therefor, to-wit: the sum of \$500, and that said land should be reconveyed to your orator upon the payment thereof." The Chancellor made an order April 15, 1882, permitting the amendment "to be filed when sworn to." The solicitor for complainant, on the 6th of November, 1882, attached his affidavit of the truth of the amendment according to his knowledge and belief. On April 17, 1882, the Chancellor refused an in-

---

---

**Marks v. Elizabeth R. and Mary G. Baker—Opinion of Court.**

---

---

junction and granted leave to amend the pleadings. A decree *pro confesso* was entered by the clerk against the defendants on December 4, 1882, the defendants having failed to plead, answer or demur. Up to this time the defendants had not entered an appearance.

On January 5, 1883, the Chancellor made an order appointing a special master to take and report testimony. On May 25, 1883, the defendants, by solicitors, moved to set aside the decree *pro confesso* on the ground that no notice of the amendment of bill had been given to defendants, and the decree was taken without their consent. The court granted the motion and ordered that defendants be allowed until the first day of July, 1883, to plead, answer or demur to the amended bill.

From this order complainant appealed.

The foregoing exhibits the status of the case at the time the appeal was taken, as we understand the record.

The grounds of the appeal are that defendants did not show any sufficient cause for setting aside the decree *pro confesso*; that no notice of the amendment of the bill was necessary because no answer had been filed and no copy of bill had been taken out by defendants, and there was no deceit, surprise or irregularity in obtaining the decree, therefore the application to set aside the decree after it had become absolute ought not to have been granted. *Stribling vs. Hart et al.*, 20 Fla., 235.

Assuming that the complainant had the right under the rules to amend his bill as filed against the defendants in their representative capacity and as heirs at law, by striking out all charges against them in such capacity and inserting the words "in their own right" after their individual names, thus discontinuing the suit as against the representatives of the deceased and continuing it as against the defendants personally, we must agree with appellant

---

---

Marks v. Elizabeth R. and Mary G. Baker—Opinion of Court.

---

---

that the defendants were not entitled to have the decree *pro confesso* vacated after it had been of record twenty days, according to our construction of the 45th equity rule, and that the complainant was entitled to such decree as the equities of his bill authorize. *Stribling vs. Hart, supra; Trustees vs. R. R. Co., 16 Fla., 730.*

After the bill was amended as stated the only parties before the court were the complainant and the defendants in their personal capacity, and the bill not charging any fraud, or that any mistake or accident had entered into the transaction, or any other ground of equitable cognizance as to these defendants in respect to the deed sought to be revoked, the complainant was entitled to no decree under his bill. The matter on account of which a decree was sought was an agreement between him and Baker, deceased, and his legal representatives are not parties. As the bill stood before the amendment the representatives were parties, *as such, and as heirs at law*, while the bill charged nothing against defendants in any other right or capacity. If any cause had been alleged for setting aside the deed, not only the defendants, as grantees, named in the deed, but also the legal representatives of Baker, must have been parties. It is Baker's contract that is charged to have been broken.

Under the statements of the bill, if the purchase price of the land conveyed was not paid or otherwise satisfied, and the defendants have no other legal, equitable interest in the property than that stated, it may be that an equitable right exists in the complainant to subject the land as for a balance of the purchase price remaining unpaid.

As no decree could be made in behalf of the complainant upon the bill under the decree *pro confesso*, he has no ground of appeal from the order setting it aside. We can-

---

---

Joost v. Elliott—Opinion of Court.

---

---

not, therefore, reverse the order, but will dismiss the appeal and remand the cause with the direction that the bill be dismissed without prejudice.

---

JOHN JOOST, APPELLANT, VS. CHARLES G. ELLIOTT, APPELLEE.

P. TISCHLER, APPELLANT, VS. L. W. WALL, APPELLEE.

1. A paper purporting to be a citation which is not yet properly tested, and which is not served by an authorized officer, is not a legal notice of an appeal.
2. Writs issuing from this court or by the Clerk of the Circuit Court, which serve the purposes of writs of this court, should be tested in the name of the Chief-Justice of this court. There is no law authorizing any writ to be tested in the name of the Judge of the Circuit Court.

Appeals from the Circuit Court for Duval County.

The appellees moved to dismiss. The other facts are stated in the opinion.

*M. C. Jordan* for Wall, movant.

*T. A. McDonnell* for Joost, Appellant.

*J. W. Archibald* for Elliott, movant.

*John T. & Geo. U. Walker* for Tischler, Appellant.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

In one of the above cases, *Tischler vs. Wall*, the citation is tested in the name of the Judge of the Circuit Court, and is served by an individual, not an officer of the court.

---

---

Joost v. Elliott—Opinion of Court.

---

---

All writs issuing from the Circuit Court, except writs of error, under the act of February 10, 1832, Thomp. Dig., 447, sec. 4, are by the statute required to be tested in the name of the Clerk of the Circuit Court, and all writs issuing from this court or by the Clerk of the Circuit Court which serve the purposes of writs of this court should be tested in the name of the Chief-Justice of this court, where the statute does not otherwise direct. There is no statute in this State authorizing or requiring any writ to be tested in the name of the Judge of the Circuit Court. We thus have no legal citation, and no legal service of what purports to be a citation.

In the other case, Joost vs. Elliott, there is no citation and none has been issued. The appeals are taken to this term. The consequence is that these appeals must be dismissed for want of any legal citation. While discussing this subject we will remark, in order that the proper practice may be known, that the originals of all writs by which parties are brought into this court, whether they have issued from this court or by the Clerk of the Circuit Court, should accompany the transcript of the record here if service has been perfected when the record is filed, and if service has not been then perfected the writ should be returned to this court when served and by the proper return day. These judicial writs perform, to a great extent, the same function here that the original or summons *ad respondendum* performs in ordinary actions in the Circuit Court.

In one of these cases service of citation was made by a private person, not an officer. There is no rule of court or statute of the State which authorized such a proceeding. It is, therefore, no legal notice.

Our attention has been called to the case of Dayton vs. Lash, 4 Otto, 112. The difference between that case and

---

Lara, Ross & Co. v. Greeley and Blaisdell—Argument of Counsel.

---

this is that in that case there was a legal citation not served, while in these cases we have no legal citation.

The appeals are dismissed for want of legal citation.

---

LARA, ROSS & CO., APPELLANTS, VS. GREELEY AND BLAISDELL, APPELLEES.

1. A. contracts with B. to do certain work. One of the stipulations of the contract is that payments shall be made to B. when the work contracted for shall have been inspected and accepted, A. reserving ten per cent. from each payment until the whole work shall have been inspected and accepted; A. to have power in case of B's failure to perform the work faithfully, to annul the contract. The reserved percentage in such event was to be forfeited. B. contracts with C. to do the work upon like terms as existed between himself and A. C. performs a part of the work but fails to complete it and abandons it. B. completes the work and collects the money due on the entire contract: *Held*, That C. is not entitled to the ten per cent. retained from amounts due him for work done by him under his contract with B.
2. Where the testimony of plaintiff is that the contract upon which he sues was made at a certain place, and in the presence of named disinterested parties, and these parties when examined deny any knowledge of such contract, plaintiff's testimony must be rejected in the determination of the cause.

Appeal from the Circuit Court for Duval County.

The case was tried before Mr. H. H. Buckman as Referee.

The facts of the case are stated in the opinion.

*Fleming & Daniel* for Appellants.

*R. B. Archibald* for Appellees.

This is an action to recover a balance due for labor and materials where the plaintiffs partly performed the contract



---

---

**Lara, Ross & Co. v. Greeley and Blaisdell—Argument of Counsel.**

---

---

and which part performance was accepted by the defendants and was of value to them, but plaintiffs did not perform the entire contract within the time specified in the contract.

Where work done under a contract has been accepted the contractor is entitled to the contract price, less the cost of completing his unfinished contract. *Howard vs. City of Oshkosh*, 37 Wis.; 242. Same principle held in *Lee vs. Beebe*, 13 Hun., N. Y., 89; *Cunningham vs. Morrell*, 10 John., 203.

In this case, *Greeley and Blaisdell vs. Lara, Ross & Co.*, it was agreed by and between the parties to the contract that periodically there should be an inspection of the work done and if accepted by the government engineer making such inspection the plaintiffs were to be entitled to pay for such accepted portion, less ten per cent. This rendered the contract severable. 2 *Parsons on Contracts*, 6th Ed., pages 517 and 518; *Woods vs. Russell*, 5 B. and Ald., 942; *Clark vs. Spence*, 4 A. & E., 448; *Laidler vs. Burlinson*, 2 M. and W., 602; *Cunningham vs. Morrell*, 10 John., 203.

But even in cases where the contract is not severable, where a party has done work and furnished materials which another has retained and accepted, the law implies a promise on the part of the latter to pay what would be a reasonable price, less any damages which the latter may have sustained by reason of the non-performance of the entire contract. 2d *Parsons on Contracts*, 6th Ed., page 523; *Tunno*, and *Jessup & Co. vs. Robert*, 16 Fla., 738; Rule stated on page 744 and cases therein cited; *Sickles vs. Patison*, 14 Wend., 257.

The evidence in this case shows that the latter portion of the work done and materials furnished by the plaintiffs for the defendants was performed and furnished, accepted and partly paid for by the defendants, after date for com-

---

---

Lara, Ross & Co. v. Greeley and Blaisdell—Opinion of Court.

---

---

pletion of the contract, showing a waiver of the condition in the contract as to time of completion of the work. 18 Barbour, (s. c.) 112; Matthew, 18th chap., 23d verse.

We further claim that when the agreement was made at the Carlton House it was agreed that defendants should complete the work and give up plaintiffs' bond, and that plaintiffs should have "all they had earned," which included the 10 per cent. sued for.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an appeal from the Circuit Court for Duval county, the trial and judgment being by a referee.

The action was assumpsit and the causes of action set up were amounts due under an alleged special contract, and amounts alleged to be due for work done and materials furnished by plaintiffs, Greeley and Blaisdell, to defendants, Lara, Ross & Co. The referee gave judgment for plaintiffs, and from this judgment this appeal is taken.

There are two written contracts in the case and one alleged verbal contract. Out of the two written contracts the claim for work and labor arises, and the verbal contract is subsequent to the written contracts and is also based upon what happened under the two written contracts. It is thus apparent that the consideration of the claim for work and labor under the written contracts first will save a repetition of the statement of the nature of such contracts when we come to consider the claim under the special contract, and will at the same time earlier disclose the material facts and merits of the controversy.

The claim is for work and material furnished under a contract not fully performed. The first position is that whether the contract be entire or severable plaintiffs were

---

---

Lara, Ross & Co. v. Greeley and Blaisdell—Opinion of Court.

---

---

entitled to recover the amount claimed under their *quantum meruit* and *valebant* counts.

On the 4th September, 1880, defendants, Lara, Ross & Co., entered into a contract with the United States, through its proper engineer officer, General Q. A. Gilmore, for the construction of jetties at the entrance to Cumberland Sound, between Georgia and Florida. This contract is very lengthy, embracing various specifications as to the nature of the materials out of which the jetties were to be constructed, and other matters, a knowledge of which is not necessary to the understanding or determination of this controversy. The provisions of the contract, so far as necessary to the determination of this case, were as follows: That Lara, Ross & Co. should furnish all the materials for and construct certain jetties at the entrance to Cumberland Sound in accordance with the requirements of the specifications contained in the proposals of the United States, dated August 31, 1880; that "payment should be made to the said Lara, Ross & Co., when the work contracted for shall have been inspected and accepted, reserving ten per cent. from each payment *until the whole work shall have been inspected and accepted;*" that in the event Lara, Ross & Co., in the judgment of the engineer in charge, failed to prosecute the work faithfully and diligently in accordance with the specifications and requirements of the contract, the party of the first part, General Q. A. Gilmore, as the representative of the United States, with the sanction of the Chief Engineer, should have power to annul the contract by giving notice in writing to that effect, and upon the giving of such notice all money or reserved percentage due, or to become due, to Lara, Ross & Co. by reason of this contract shall be and become forfeited to the United States; that if the delay is occasioned by no fault of Lara, Ross & Co., but by force or violence of the elements, additional

---



---

Lara, Ross & Co. v. Greeley and Blaisdell—Opinion of Court.

---



---

time might be allowed, and that the government, in case of failure, might provide for the further prosecution of the work; that monthly inspections were to be made by the engineer in charge and a payment of ninety per cent. of the contract price made if the work was satisfactory.

This contract was dated September 4, 1880. The date at which the work was to be completed is stated by appellants' attorney to have been the 30th June, 1881. This is not denied, so far as we can ascertain, and we take it to be correct.

On February 1st, 1881, an agreement was entered into by Lara, Ross & Co. with Greeley and Blaisdell, by which Lara, Ross & Co. appointed Greeley and Blaisdell their agents and attorneys to furnish all the material, do all the work and receive all the moneys under their (L., R. & Co.'s) contract before stated. The parties also stipulated that the work was to be done as set forth in the contract between Lara, Ross & Co. and the United States and the specifications thereunto attached.

This is the substance of the two written contracts, so far as we think their provisions material in the determination of this case.

Greeley and Blaisdell commenced the work. After much delay and repeated complaints by the officers in charge, Greeley and Blaisdell having failed to carry out their contract with Lara, Ross & Co., the contract between Lara, Ross & Co. was cancelled, each of the firms agreeing to the cancellation and signing the paper.

Greeley and Blaisdell received all but the reserved ten per cent. up to the time they ceased to comply with their contract.

They were paid:

September 14, 1881 .....	\$5,506.24
March 2, 1882 .....	526.80

---

Lara, Ross & Co. v. Greeley and Blaisdell—Opinion of Court.

---

---

June 20, 1882 .....	3,890.00
	<hr/> \$9,922.54

---

Lara, Ross & Co., then, under the supervision of the officers of the government, completed their contract with the government and received the full sum due, including the ten per cent. reserved from the work performed by Greeley and Blaisdell, as their agents, and under the agreement between them. This is what Greeley and Blaisdell claim under their *quantum meruit* and *valebant* counts. Are they entitled to it? The evidence discloses that there was no privity between Greeley and Blaisdell and the United States, the representatives of the government dealing exclusively with Lara, Ross & Co., and having no connection with Greeley and Blaisdell except as the agents of Lara, Ross & Co. This is shown by the testimony of General Gilmore, by the method of payment, and, indeed, by the contracts themselves upon their face. The vouchers for the work done by Greeley and Blaisdell were made out in the name of Lara, Ross & Co., and payments were made to Greeley and Blaisdell by transfer or assignment of this paper. All that existed here was a knowledge upon the part of the officers of the government that Greeley and Blaisdell were acting for Lara, Ross & Co., and under contract with them. I cannot discover from this record that the United States had even any positive knowledge of the contract between Lara, Ross & Co. and Greeley and Blaisdell at the time it was entered into. The measure, the nature and the extent of the reciprocal obligations existing between Lara, Ross & Co., and Greeley and Blaisdell, were fixed by reference to the terms of the contract between the United States and Lara, Ross & Co. so far as these terms could be made applicable. This, with the knowledge by the United States that Greeley and Blaisdell were acting as sub-contractors, did not create any privity of contract be-

---

---

Lara, Ross & Co. v. Greeley and Blaisdell—Opinion of Court.

---

---

tween the United States and Greeley and Blaisdell. The contract between the government and Lara, Ross & Co. was admissible here only as showing the nature of the contract between Greeley and Blaisdell and Lara, Ross & Co., and not as showing the contract between the government and Lara, Ross & Co., except for that purpose and to that extent.

Much has been said in this case in argument and upon brief as to this question of recovering for the work and value of materials furnished where the contract was entire and there was only part performance. We think those questions have no place here, for whatever may be the rule upon the subject, it does not apply where the parties themselves agree as to the result of a non-performance in the particular in which a non-performance has occurred. The whole theory upon which these recoveries are permitted is that the parties not having agreed as to the result of non-performance to the extent it exists, the party accepting the service will be held to pay to the extent he has been benefited. Says Mr. Justice Parker in *Britton vs. Turner*, 6 N. H., 481: "The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with the knowledge also that the other may eventually fail of completing the entire term. If, under such circumstances, he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulation of the contract." But, says the court: "If parties choose to provide by express agreement that nothing shall

---

---

Lara, Ross & Co. v. Greeley and Blaisdell—Opinion of Court.

---

---

be earned if the laborer leaves his employer without having performed the whole service contemplated, then there can be no pretence for a recovery if he voluntarily deserts the service.” This case goes as far as any case in the United States to sustain recoveries under *quantum meruit* and *valebant* counts in case of part performance of entire contracts and the application of the rule it announces cannot be objected to by Greeley and Blaisdell here. In this case the contract is express that this ten per cent. sought to be recovered was to be retained and not to be paid to Greeley and Blaisdell unless they completed the work which they contracted to do. They abandoned the work, Lara, Ross & Co., carried out their contract with the United States, and being paid the ten per cent. from the government it is theirs. This is not the case of non-performance of an entire contract where the result of non-performance is not provided for or stipulated in which the party may recover for what he did or furnished. It is the case of non-performance where the result of non-performance to the extent it existed is agreed upon by the parties.

There only remains to be considered the claim of Greeley and Blaisdell to recover under the alleged special contract.

The burden of proof here is upon Greeley and Blaisdell to establish this alleged special contract. They here fail to do so. Every person present at the time the alleged contract was made swear that they heard no such transactions as the interested parties testify occurred here. Where the testimony of a plaintiff is to the effect that the contract upon which he sues was made at a certain place and in the presence of named disinterested parties, and these parties unanimously deny the making of such contract in their presence it is going too far to accept the testimony of the

---

---

**Wharton v. Hammond—Syllabus.**

---

---

plaintiff instead of such disinterested parties. Plaintiffs testimony is here overwhelmingly overthrown.

Judgment reversed and there will be final judgment for appellants, including costs in the Circuit Court appearing by the record to have been paid in that court by them as well as for the costs in this court.

The appellee filed a petition for a rehearing.

The opinion denying a rehearing was delivered by MR. JUSTICE WESTCOTT.

The rehearing is denied. The contract is as we have stated it at length in the opinion.

The basis of this petition is the idea that in case Greeley and Blaisdell failed to complete the contract they were to be entitled to the ten per cent. reserved if Lara, Ross & Co. did complete the work and receive it from the United States. That was not the contract. Simply reading it will disclose that there was no privity between G. and B. and the United States. G. and B. agreed that L., R. & Co. should retain this ten per cent. if they violated this contract. They have violated their contract and must abide by the consequences of their own act as between L., R. & Co. and G. and B. L., R. & Co. had a right to retain the ten per cent. I have not the least doubt of the correction of the conclusion reached.

---

THOMAS J. WHARTON, APPELLANT, VS. DAVID M. HAMMOND, APPELLEE.

1. A promissory note, and mortgage to secure its payment, given by a client to his attorney to secure payment for professional services, will be sustained if the transaction is fair, honorable and proper.



---

---

Wharton v. Hammond—Opinion of Court.

---

---

2. Where there is simple conflict in the testimony, the findings of a referee will not be disturbed.

Appeal from the Circuit Court for Nassau county.

The case was tried before Mr. Wm. B. Young as referee.

The facts of the case are sufficiently stated in the opinion.

*Jno. T. & Geo. U. Walker* for Appellant.

*D. M. Hammond, in pro. per.*

MR. JUSTICE WESTCOTT delivered the opinion of the court.

Thomas J. Wharton, on the 28th of April, 1877, gave his promissory note to Hinton J. Baker, payable one year after date, for the sum of three hundred (300) dollars, executing at the same time a mortgage upon lots in Fernandina to secure its payment.

On the fourth of February, 1882, after the note was due and dishonored, Baker endorsed the note and transferred and assigned both the note and mortgage to David M. Hammond, the respondent here and plaintiff below. The bill in this case is to foreclose this mortgage and have payment of the debt. It is an ordinary bill to foreclose a mortgage.

The defendant, Wharton, answers the bill, admits the execution of the note and mortgage and the transfer and assignment as alleged, and that he has not paid "said note and discharged said mortgage." He, however, denies that the sum, principal and interest of the note, is due, and states the facts to be "that some time previous to the year 1877 H. J. Baker, the aforesaid mortgagee, undertook under a verbal agreement with me to prosecute for me in his capacity as an attorney at law my claim to certain lots of land

---

---

Wharton v. Hammond—Opinion of Court.

---

---

situate in the city of Fernandina, Florida, of which there were six in all, said lots being at the time held by various persons against me under claim derived from tax title, said verbal contract or agreement being as follows: For each lot recovered I agreed to pay H. J. Baker for his services as attorney aforesaid the sum of fifty dollars, and that for those cases in which I failed to recover he agreed that he would make no charge against me. H. J. Baker, my said attorney, under this agreement entered suits for the said lots for me, and recovery was had and trial for two of the said lots, the remaining cases being yet undisposed of, and he, Baker, proposing still to carry on the litigation for me, proposed that I should execute a mortgage of the said two lots already recovered to him to cover the contingent fees, as well as what was then due for the recovery of the two lots aforesaid. I consented to give a mortgage upon one of said lots to secure to said Baker a note which I then executed for three hundred dollars, being the same note and mortgage set forth in complainant's said bill of complaint; and I further state the fact to be that there was a total failure to recover any other of said lots, \* \* \* \* and so it is, I say, that if there be anything due to complainant it is only the sum which would be due to H. J. Baker, to whom I gave said note and mortgage, with a proper amount of interest thereon, that is to say, one hundred dollars and interest thereon from the date of the recovery of the two lots aforesaid at eight per cent. per annum, which I am willing to pay. But as to the said interest I state the fact to be that said Baker did as my agent collect rent upon said lots from the tenants thereon to an amount sufficient to pay all such interest; and I respectfully submit to this honorable court and claim the said amount as a payment of said interest and in event said rents prove upon accounting to be more than said interest that the ex-

---

---

O'Neil v. Percival et ux.—Syllabus.

---

---

cess be visited upon said principal sum of one hundred dollars.”

To this answer there was a general replication. There was an order of reference; the case was tried by W. B. Young, referee, who found for the plaintiff, giving him credit for the amount of rents collected.

The referee, in his finding, states: “The evidence on the part of the complainant is the note and mortgage, and the testimony of H. J. Baker, taken before the referee. The evidence on the part of the defendant is the deposition of Wharton. Counsel for the defendant attacks the note and mortgage because it is a security taken by the payee while the relation of attorney and client existed. He claims that the presumption is that the transaction is unfair, and that the onus of proving its fairness is on the complainant.”

No such defence as is urged here, that is, that the note and mortgage are void, as being taken by an attorney from his client, is made in the answer. If it was, the testimony discloses and shows that the whole transaction was fair, honorable and proper. As to the amount due, there is simply conflict in the testimony, and we see no reason to disagree with the conclusions of the referee in this regard.

The judgment is affirmed.

---

JOHN O'NEIL, APPELLANT, vs. ALEXANDER K. PERCIVAL  
ET UX., APPELLEES.

The statutes of this State relating to mechanic's liens, authorizing an executory contract to be followed by a personal judgment, do not embrace married women.

Appeal from the Circuit Court for Duval county.

---

---

O'Neil v. Percival et ux.—Opinion of Court.

---

---

The facts of the case are stated in the opinion.

*John T. & Geo. U. Walker* for Appellant.

*A. W. Cockrell* for Appellees.

MR. JUSTICE WESTCOTT *delivered the opinion of the Court.*

This case arises upon a demurrer of Percival and wife to O'Neil's declaration under the mechanic's lien law, seeking the sale of a lot and a building thereon, the property of Mrs. Percival, to satisfy a debt due the firm of which he is sole surviving partner, for material furnished in the construction of such building, and for a judgment against her for the amount of the debt due.

The material grounds set up in this demurrer are, that the mechanic's lien law is not applicable to the separate statutory property of a married woman. In other words, that she cannot make an executory contract under this statute, as such contract, if enforceable, involves a personal judgment against her and she is not empowered specifically in the law to make such contract or thus bind her person and estate, and that the plaintiff's declaration does not set up with requisite certainty the nature of the contract, or that she was a party to it.

The statute, chapter 3042, act of March 7, 1877, provides that persons furnishing materials for the construction or repair of any buildings may have a lien upon the buildings, and on "the interest of the owner in the lot or land on which it stands" to the extent of the value of any labor done or materials furnished; that any person having such lien may enforce the same by bringing suit in any court of "competent jurisdiction of the amount claimed;" that in such action the issue shall be made up and tried as in other

---

---

O'Neill v. Percival et ux.—Opinion of Court.

---

---

cases; that the court may, by its judgment, direct a sale of the land for the satisfaction of the lien and costs, and that there may be judgment against the original debtor for the amount of the debt.

It has been held from an early date in this court, and indeed in the courts of nearly every State in the Union, that a statute authorizing in general terms an executory contract which can result in a personal judgment either at law or in equity, does not embrace a married woman unless such is the manifest clear intent of the Legislature. She must, at least, be given the general power to contract under some statute, either a general law giving this power or under the terms of the lien law. She is in no manner alluded to in this statute unless she is embraced in the term "owner." In the States where she has no general power to contract granted to her, or where she is not invested with the powers of a *feme sole*, to such extent mechanic's lien laws authorizing executory contracts of this character by the "owner" and attended by the results named are generally, if not uniformly, held not to give the power to a married woman to thus bind her estate. Here this law not only binds her estate, but authorizes a general, personal judgment without giving to a wife in terms or by necessary implication a general power to make a contract upon which to base such personal judgment. Even in equity in cases where relief is granted against the separate estate or separate statutory property of a married woman, and a charge upon it is established, the jurisdiction is exercised as a substitute for the power to contract, and while the charge is established against the *rem*, there is no decree or judgment against the person.

This court has repeatedly held that to enable a married woman to bind herself as this statute proposes to bind the "owner" of property, there must be something more than

---

---

**Harwood et ux. v. Root et ux.—Syllabus.**

---

---

the grant of a general power to persons to contract or to make a contract of a particular character. As we remarked in the case of Dollner, Potter & Co., 16 Fla., 96, when speaking of the statute enabling a wife to acquire property, real or personal, by purchase, "such a construction," that is, one making the *feme covert* liable at law for the purchase money of property acquired by purchase, "would manifestly extend the statutory provisions beyond the limits contemplated by the Legislature, and would overturn well established rules of law defining the rights of married women."

If the Legislature wishes to confer the power upon married women to make general contracts binding them to the extent of making them liable to personal judgments, it must do so. This statute does not go to this extent.

As a matter of course in what we have said we do not propose to determine the rights of this creditor when he seeks a court of equity as a forum in which to establish an equitable charge.

The judgment is affirmed.

---

NORMAN B. HARWOOD ET UX., APPELLANTS, VS. WILLIAM  
.. ROOT ET UX., APPELLEES.

1. In the premises of a deed to a married woman the words of transfer are, "grant, bargain, sell, alien, convey and confirm unto the said party of the second part, her heirs and assigns," and the words in the *habendum* and *tenendum* clause of the deed are "to have and to hold the aforesaid bargained premises, together with all and singular the rights, tenements, hereditaments and appurtenances to the same belonging, unto the said party of the second part, her heirs and assigns, to her and their own sole and proper use, benefit and behoof in fee simple." *Held*, That no

---

---

Harwood et ux. v. Root et ux.—Argument of Counsel.

---

---

equitable separate estate passes, and that the wife holds the property as her separate statutory property.

2. A married woman purchases property. She and her husband join in the execution of a promissory note for the purchase money. That the husband is insolvent is known to the vendor and the credit is given, looking to the separate statutory property of the wife: *Held*, That a court of equity will sequester the rents and profits of the separate statutory property of the wife to secure payment of the debt.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

*John E. Hartridge* for Appellant.

The intervention of a trustee is not necessary to create an estate for the separate use of a married woman. Perry on Trusts, Vol. 2, §647, and authorities there cited; Hamilton vs. Bishop, 8th Yerger, 33, (29 Am. Dec., 101.)

Though the authorities are conflicting as to what words are sufficient to create a separate use in a married woman all agree that it is immaterial what form of phrases is used in the conveyance. Technical language is not necessary; all that is required is that the intention of the gift should appear manifestly to be for the wife's separate enjoyment, and this intention is to be gathered from the instrument and by a consideration of the facts and circumstances surrounding the grantor and grantee. Clancy's Husband and Wife, 262; Hamilton vs. Bishop, 8 Yerger, 33; Smith vs. Wells, 7 Metcalf, 240, (39 Am. Dec., 772); Smith vs. Henry, 35 Miss., 377.

If the grantors in these deeds intended Mrs. Root to take a "statutory separate property" in the land conveyed it was only necessary for them to pay in the tenendum clause. "To have and to hold to her and her heirs forever," and the words "own, sole and proper use, benefit and behoof" in

---

---

Harwood et ux. v. Root et ux.—Argument of Counsel.

---

---

one deed, and the words “own proper use, benefit and behoof forever” in the other, are the merest surplusage. The parties to the deeds and the conveyancer who wrote them knew the law.

These words and words of like import have been repeatedly held to create in a married woman an estate independent of her husband. *Adamson vs. Armatage*, 19 Ves., 416; *Davis vs. Prout*, 7 Beav., 288; *Jamison vs. Brady*, 6 Serg. and R., 466, (9 Am. Dec., 460;) *Snyder vs. Snyder*, 10 Pa. St., 423; *Jarvis vs. Prentice*, 19 Conn., 272; *Goodrum vs. Goodrum*, 8 Ired. Eq., 313; *Tyler vs. Lake*, 2 Russ and My., 188; *Smith vs. Wells*, 7 Metcalf, 240, (39 Am. Dec., 772); *Bishop on the Law of Married Women*, Vol. 1, §828; *Perry on Trusts*, Vol. 2, §648.

The words “for her sole and separate use” are everywhere held to be effectual to create in a married woman an estate independent of her husband. *Perry on Trusts*, Vol. 2, 648.

In *Tyler vs. Lake*, above cited, Lord Chancellor Brougham said that “the word ‘proper’ is the Latin form of ‘own,’ and can mean nothing more.” Keeping this meaning of the word “proper” in view, and the only purpose it can fill in the deed in question is to convey the idea that the property granted was to be held for the *exclusive* use of Mrs. Root, and hence its effect is precisely the same as if the word “separate” had been written in its place.

If it had been intended to grant the property to be held subject to the marital rights of the husband the words used were unnecessary and improper. But the insertion of these words is tantamount to saying “for her use and not for the use of her husband.”

If Mrs. Root holds the lands conveyed by these deeds, or either of them, as her sole and separate property then the



---

---

Harwood et ux. v. Root et ux.—Argument of Counsel.

---

---

lot or lots so held by her are liable for this debt and can be subjected in a court of equity.

The bill alleges that Root was known to complainants to be insolvent and that the credit was given to Mrs. Root upon the faith of this property.

*Feme covert* acting with respect to her separate property is competent to act in all respects as if she were *sole*. Clancy's Husband and Wife, 282, 331, *et seq.*; Perry on Trusts, Vol. 2, §657, *et seq.*

The creation of the debt is *prima facie* evidence of an intention to charge the estate. Bishop on the Law of Married Women, Vol. 1, §§854, 878, 1879; Story's Equity, §1400, *et seq.*; Blummer *et ux.* vs. Pollack & Co., 18 Fla., 707.

The right of a creditor in such a case as is made by appellant's bill to subject the separate estate or property of a married woman to the satisfaction of his debt, whether secured by mortgage or not, has been recognized by this court repeatedly. Adms. of Smith vs. Poythers, 2d Fla., 92; Merritt vs. Jenkins, 17 Fla., 593; Mattair vs. Card, 18 Fla., 766; 18 Fla., 718; *Id.*, 809; Thrasher vs. Doig and Geiger, 18 Fla., 821.

The indebtedness in this case having been contracted for the benefit of Mrs. Root's estate, and to enable her to use it, appellants maintain that the property described in the exhibits to the bill is liable for their claim whether Mrs. Root holds it as her separate estate under the deeds or as her "separate statutory property." This we understand to be the decision of this court. Stanley vs. Hamilton, *et ux.*, 19 Fla., 275.

*Wm. B. Young* on same side.

Under the laws of Florida the use and benefit of the "separate statutory property" of the wife is vested in the

---

---

Harwood et ux. v. Root et ux.—Argument of Counsel.

---

---

husband. He takes the rents, incomes and profits, and he is accountable to no one therefor. McClellan's Digest, p. 755, §5.

"The donor of the estate, if he offends no law, may impose whatever limitations, or impart whatever qualities or incidents he chooses to the estate he may create." Short vs. Battle, 52 Ala., 456.

The donor of the property, described in Exhibit A of the bill, directs that it shall be held to the "own, sole and proper use, benefit and behoof" of Mrs. Root. How can she have the "sole and proper use, benefit and behoof" of this property if her husband's marital rights under the statute are to attach to it? To hold that the property conveyed by this deed is the separate statutory property of Mrs. R. is to defeat the plain purpose of the donor as expressed in the deed. The husband and not the wife has the sole use of the separate statutory property. See the following additional authorities as to the sufficiency of the words used in the deeds to Mrs. R. to create an equitable separate estate: Short vs. Battle, 52 Ala., 456; Hooks vs. Brown, 62 Ala., 258; Newman vs. James & Newman, 12 Ala., 29; Brown vs. Johnson, 17 Ala., 232; Cuthbert vs. Wolfe, 19 Ala., 373; Gould vs. Hill, 18 Ala., 84; Ozley *et al.* vs. Ikelheimer, 26 Ala., 332; Williams vs. Avery, 38 Ala., 115; Caldwell vs. Pickens' Admr., 39 Ala., 514.

*Jon. T. & Geo. U. Walker* for Appellees.

A question arises upon the face of the note in this case. When the transaction alleged in the bill was had and the note was executed it became *the evidence* of the contract. It is to the evidence of a contract we look to determine what the contract is in law. Married women at the common law could make no contract, and if she gives a promissory note it is void. In the present instance the note de-

---

---

Harwood et ux. v. Root et ux.—Argument of Counsel.

---

---

scribed results as the note of the husband. And the evidence of this contract exhibits itself as simply the obligation of William Root. In this view, if the law operating on the fact in evidence makes it *the husband's note*, then we have a bill brought to enforce payment of a husband's note out of the separate property, the real estate, of the wife, and of course it needs no authority or argument to show that such a bill is wanting in equity. If the court takes this view of the note there is an end of the case. Should the court, however, hold that the note is the wife's and a proper subject of litigation in this suit it will be necessary to argue other questions. Upon the admitted state of facts arise the legal question in the cause. One of those embraces the rest, namely: Can the payee of a note, given as in this case, reach through a court of equity the separate estate of the wife sought in the bill and sell it to pay the note?

We contend that this question must be answered in the negative. For an exhaustive consideration of the question we refer to Radford *et al.* vs. Carwile *et al.*, decided April 19, 1879, by the Court of Appeals of West Virginia, where it is held:

1. A married woman as to property settled to her separate use is to be regarded as a *feme sole*, and has a right to dispose of all her separate personal estate, and the rents and profits of her real estate accruing during the coverture, as if she were a *feme sole*, unless the power of alienation is restrained by the instrument creating the estate.

2. Such restraint upon the power of alienation will not be implied from her being authorized to dispose of the property in a specified manner. Such restraint must either be expressed or so closely indicated as to be an equivalent to an express restraint.

3. The *jus disponendi* is an incident to the ownership of a separate estate, and it can only be taken away or limited

---

---

Harwood et ux. v. Root et ux.—Argument of Counsel.

---

---

by express words, or by an intent so clear as to be the equivalent of express words.

4. The liability of the separate estate of a married woman to the payment of all her debts incurred during coverture is also an incident of the ownership of such separate estate and it too can only be taken away by express words, or by an intent so clear as to be the equivalent of express words.

5. But these incidents, liability to the payment of her debts and her *jus disponendi*, extend no farther than to all her separate personal property, and the rents and profits of her separate real estate accruing during the continuance of the coverture.

6 The *corpus* of her separate real estate is in no manner affected by the equitable doctrine of a separate estate, which was devised to prevent the acquisition by her husband of his marital rights to all her personal property and the rents and profits of her real property during the coverture. 13 W. Va., p. 662.

7. The common law effectually protected the *corpus* of her real estate against her husband's control and against his debts. And her common law disability to incur any debt, during her coverture, which will in any manner affect or change the *corpus* of her real estate, whether such real estate be separate property or not, is still in full force. The *corpus* of her real estate can only be affected by the vendor's lien when it has been reserved, or by a conveyance, or specific lien created by deed in which her husband has united with her, and which she executed after privy examination.

8. The debts of a married woman, for which her separate estate is liable, are such as arise out of any transaction out of which a debt would have arisen if she were a *feme sole*, except that her separate estate is not bound by a bond

---

---

Harwood et ux. v. Root et ux.—Argument of Counsel.

---

---

or covenant based on no consideration, such bond or covenant being void at law, and she not being estopped from showing in a court of equity that it was based on no consideration.

9. The consideration which will support an action for her debts or contracts so as to make her separate estate liable need not inure to her own benefit, or that of her separate estate, but it may inure to the benefit of her husband, or any third party, or may be a mere prejudice to the other contracting party; in short, it may be any consideration which would support the contract if she were a *feme sole*.

10. But her separate estate cannot be made liable for the payment of any debt of her husband or of any other person unless she has agreed to pay the same by some contract in writing signed by her or by some one authorized by her. *Radford et al., vs. Carwile et al.*, 13 W. Va., 682. Of course the principles stated in nine and ten are held with reference to what is said in five and six, *supra*. 13 W. Va., 683.

In this case the court has also construed their legislation on the subject as contained in the code of W. Va., 3d section of chapter 66, and in construing our own legislation as to the property of the wife much light is shed by this comparison.

The statutes of Florida on this subject which are to be read in the light of the common law and equity jurisprudence as it existed July 4, 1776, were enacted in the years 1824, 1835, 1845, 1881, and in the Constitution of 1868.

The Constitution provided that as to all property real and personal owned by the wife before her marriage, or afterwards acquired by gift, devise, descent, or purchase, shall be her separate property and not liable for the debts of her husband. Sec. 26, Art. 4, Const. 1868. In the statute of 1845 the methods of acquiring such separate property were "by bequest, devise, gift, purchase, or distribution." Act

---

---

Harwood et ux. v. Root et ux.—Argument of Counsel.

---

---

March 6, 1845. It will be seen that the Constitution of 1868 embraces all methods named in this act, except bequest and distribution.

As to her real estate of inheritance, she can convey or mortgage it, her husband joining in the conveyance, and the statute as to privy acknowledgment be complied with. Act February 4, 1835. Her realty can only be conveyed by joint deed of herself and husband duly attested, authenticated and admitted to record. Act March 6, 1845. The act of 1881 enables her to dispose of her property by will as if she were a *feme sole*. Chap. 3249, Act February 11, 1881.

The first, second and third sections of chapter 66, Code of W. Va., which are quoted in the case of Radford *et al.* vs. Carwile *et al.*, cited *supra*, at pages 659, 660, will be found on comparison to contain very nearly the same provisions as our Constitution, 1868, Art. 4, §26; Act Feb. 4, 1835, and March 6, 1845, and February 11, 1881.

In that case the Supreme Court of W. Va., say: "The above rules," referring to those we have quoted, numbered from 1 to 10, inclusive, "will apply to a separate estate of a married woman held under the third section of chapter 66, Code of W. Va., except: 1. She holds the legal instead of the mere equitable title to such separate property. 2. She can devise such real estate. 3. If living separate and apart from her husband she may sell and convey her real estate without her husband joining in the deed or contract of sale, and it is liable for all her debts contracted while she was so living apart from her husband."

"A separate estate under this 3d section of chapter 66 of our Code is created simply by a conveyance of land to her though it is not conveyed for her sole and separate use." 13 W. Va., 683-4.

If this construction be correct it may safely be said that

---

---

Harwood et ux. v. Root et ux.—Argument of Counsel.

---

---

under the Constitution and statutes of Florida, holding the property mentioned in this bill by the language of the deeds from Holmes and Reed, that Mrs. Root “holds the legal instead of the mere equitable title” thereto. If so, and we have no statute enabling her to make contracts in relation to it, and making such contracts personally binding upon her *at law*, no statutory action which may be pursued against her in the ordinary legal remedy which ends in a recovery, judgment, and consequent execution—if no such enactment exists in Florida, then the equitable jurisdiction remains. But the arm of equity is too short to reach and subject, as is sought by this bill in this cause, *the corpus of her real estate* to pay the note to Mrs. Harwood.

Our contention is mainly based upon that broad doctrine which has, we respectfully submit, never been invaded or narrowed by the courts in the better considered opinions in which the question has been decided, and which is contained in the following propositions:

1st. While the wife is living with her husband she cannot charge or bind her separate property or estate in a case where the engagement she makes does not create an indebtedness for the benefit of her separate estate or property, except by *deed, mortgage or other instrument duly executed and acknowledged according* to the statute.

2d. Living with her husband she can make no debt which will charge or bind her separate property or estate unless from the fact that the debt is of *such a character* and entered into for *such things* as being for the *benefit* of said estate or property, it must necessarily be implied that she *intended* that payment should be made out of her said property or estate. The only hope that complainants can entertain to recover lies in so construing the note in this case as to cover it by the exception in the second proposition.

---

---

Harwood et ux. v. Root et ux.—Argument of Counsel.

---

---

Common Law: Passing the consideration of that condition of the wife at common law, where she has no separate existence, is unable to contract, enjoying, except in few instances, no property apart from her husband, we will lay down what, as we understand, is her status in equity.

Equity: From an early day courts of equity prior to any legislation recognized the separate estate of a married woman and created by *trust* for her rights and interests in property, real and personal, independent of her husband. Hence in these courts she had the power to enjoy, contract, and alienate. That is, as to such trust estate, she was regarded as a *feme sole*. But it must be remembered this status, this being as if she were unmarried, is not absolute. The principle of equitable trust investing her estate, or the instrument which conveys it to her separate use, except as to the common law rights of her husband, may restrict it.

Statutory legal separate estate: But there is another kind of separate estate in married women called the statutory legal separate estate. This is where a legal title is vested in the wife by legislation. The statutes which invest the wife with the legal title exclude the common law rights of the husband. Still, except in a few States, no attempt has been made to remove the enforcement of her engagements from the courts of equity. No such effort has been made in Florida.

In this State a married woman may acquire two kinds of separate estate. In one she gets the legal title, in the other, has the equitable title. *Dollner, Potter & Co. vs. Snow*, 16 Fla., 92.

The language of the deeds to Mrs. Root, to her heirs and assigns, to her and their own sole and proper use, benefit and behoof in fee simple, and “to her heirs and assigns to her own use, benefit and behoof forever.”

If these instructions create a *trust* estate, one in which—



---

---

Harwood et ux. v. Root et ux.—Argument of Counsel.

---

---

conceding it is not essential to name a trustee to hold for her separate use—the legal and equitable titles are separated, we contend the bill is without equity.

If the words in the deeds to Mrs. Root created a statutory separate estate under the (law) statutes of this State the equitable rule cannot apply. 19 Fla., 296.

That these deeds did create a separate statutory estate, see Lippincott vs. Mitchell, 4 Otto, 767.

But treating Mrs. Root's estate under the deeds as an equitable estate, for the sake of the argument grant that in this State the English rule which makes liable in equity the wife's separate estate for all those engagements which being made with reference to it are *intended* to be based on its faith and credit *is the law*, then is the contract *evidenced* by this *note constituted* as claimed by the bill in this cause, and as admitted by the demurrer, of *that class* for which her separate property or estate is, under this doctrine, liable? Let us, since we are now looking upon the estate held by the defendant under the deeds to her as an equitable separate estate, take the strongest view which can be assumed for the complainants and deduce the answer to that question. We will say that, although it does not appear from the note sued on that Mrs. Root *intended* dealing with complainants on the faith and credit of her separate estate, yet it is not essential that it should, if it can be gathered from the nature or form of the contract that it was made with an intention to and did bind, and did confer benefit upon her separate estate, this will be enough. Then if it can be collected from this note, made in the circumstances out of which it grew, that Mrs. Root gave it in reference to a benefit to her separate estate, and with the intention to so benefit her property, it is liable, and complainants ought to recover. Mark well, if the court please, this deduction depends upon the question: *Did she buy the furniture for the*

---

---

Harwood et ux. v. Root et ux.—Argument of Counsel.

---

---

*benefit of her separate estate?* It would be idle to argue to this court that she could not have had in her mind any such notion, that the purchase and acquisition of a set or dozen sets of furniture however valuable would benefit her separate estate. We would be obliged to the solicitors of complainants if they can define to us the *benefit* which would flow to Mrs. Root's property mentioned in their bill from the purchase of the furniture which formerly belonged to Mrs. Harwood. That she gave a promissory note in order to get some furniture highly valuable and costly forsooth to the end that her property might appreciate in value seems the height of absurdity. What part of her separate estate in all the property conveyed to her in those deeds was to be benefited or was benefited by placing the furniture in her house? Did it when put into the house at once descend into the land on which it stands and so instantly become a part of and fixed to the freehold? What purchaser would be likely to make it a condition of his bargain and sale of that home that he found the aforesaid furniture there? Did it add to the Bay street property by some magical influence some dollars, nay, a single dollar's worth?

An examination of the decisions of this court upon this subject will show, we confidently submit, that the contract, if such it may be called, by Mrs. Root was not such as that her separate property or estate is liable, conceding that there is no necessity to express the intention to bind the separate estate of the wife in engagements made by her.

We refer to and cite Admr. of Smith vs. Poythers, 2 Fla., 92; Lewis vs. Gale, 4 Fla., 418; Maiben vs. Bobe, 6 Fla., 381; Sanderson vs. Jones, Id., 430; Tison vs. Mattair, 8 Fla., 107; Mattair vs. Card, 18 Fla., 761.

The enforcement of the engagement by her must be exclusively according to equity, if at all. To this point we

---

---

Harwood et ux. v. Root et ux.—Opinion of Court.

---

---

believe we have sufficiently addressed our argument, and in conclusion, in support of the propositions we contended for in the outset, we refer to the opinion of the present Supreme Court, speaking by its Chief-Justice, in the decision in the latest case on the subject. We cite *Staley vs. Hamilton*, 19 Fla., p. 275.

MR. JUSTICE WESCOTT delivered the opinion of the court.

This case arises upon a demurrer to a bill filed by appellants against respondents seeking to subject the property of Emma C. Root to the payment of a debt due by her to Susan D. Harwood for goods purchased of her.

The material portions of the bill are brief and may be here inserted.

Plaintiffs allege first, "that on the 11th day of February, A. D. 1882, your orators sold and delivered to the defendant, Emma C. Root, with the approval and consent of her husband, the said William Root, a lot of household furniture to be used by the said Emma in her home, and is now in her said home and her said use, in the house erected as the property described in Exhibit A hereto attached, and the said furniture was suitable to the condition in life and estate of the said Emma.

2. "That upon the delivery of said furniture to the said Emma, she and her said husband executed and delivered to the complainant, Susan D. Harwood, their promissory note for the sum of fourteen hundred and twenty dollars, payable one year after date, with interest at ten per cent. until paid, for the purchase money of said furniture, and said furniture was reasonably worth said sum.

3. "That at the time of the sale of the said furniture to the said Emma, it was the separate property of the complainant, Susan D. Harwood.

---

---

Harwood et ux. v. Root et ux.—Opinion of Court.

---

---

4. "Then at the time of said sale of said furniture and the taking of said note the said Emma was seised and possessed of the following described property." Then follows a description of the property. [Real estate in the city of Jacksonville.—REP.]

5. "That your orators knew at the time said credit was given that the said Emma was seised and possessed of said property, and they were induced to give credit to her and part with their said property by reason of the said Emma's ownership of said valuable property and their confidence in her ability and willingness to pay them as she agreed to do.

6. "That at the time said credit was given the said William Root was insolvent, which was well known to your orators, and his insolvency continues down to the date of the filing of this bill, and that the said Emma and her family are in the use and enjoyment of the property purchased by her."

In the premises of one of the deeds under which the property sought to be subjected here was acquired by Mrs. Root, the words of transfer to the grantee are "grant, bargain, sell, alien, convey and confirm unto the said party of the second part, her heirs and assigns," the *habendum* and *tenendum* clause of the deed being "to have and to hold the aforesaid bargained premises together with all and singular the rights, members, tenements, hereditaments and appurtenances to the same belonging unto the said party of the second part, her heirs and assigns, to her and their own sole and proper use, benefit and behoof in fee simple.

In the other deed covering the property sought to be subjected the words of transfer in the premises are have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of

---

---

Harwood et ux. v. Root et ux.—Opinion of Court.

---

---

the second part and her heirs and assigns forever, the *habendum* clause being “to have and to hold the above granted, bargained and described premises with the appurtenances unto the said party of the second part her heirs and assigns to her own proper use, benefit and behoof forever.”

Plaintiffs prayed that a sale might be had of so much of the property described in the bill as was necessary to pay the debt and costs of suit and for alternative relief.

Defendants’ demurrer to this bill was sustained and plaintiffs appeal, assigning this action of the court as the ground of reversal.

There were two general questions involved in the disposition of this demurrer.

First. Whether this property is the separate estate or the separate statutory property of Mrs. Root.

Second. Whichever it may be, is the debt, described in the bill, in any way a charge upon this property, and if so, in what way is such charge to be satisfied.

To the first question: It is to be noticed here that there is no trustee named in the deed in whom is the legal title, the beneficial interest being in the wife. This is not essential to the preservation of the rights of the wife against the marital rights of the husband if the intent of the donor or grantor to create a separate estate clearly appears.

The rule in determining whether an estate granted in a deed of this character here to the wife, that is, a deed directly to the wife without any intervening or subsequent estate, a simple deed in fee, is her separate estate or separate statutory property, is that “where the intent to exclude the marital rights of the husband is doubtful or equivocal, or rests on speculation, the statute intervenes and fixes the character of the estate as the separate statutory estate of the wife.” *Short vs. Battle*, 52 Ala., 456.

Under our present system there is no such thing as an es-

---

---

Harwood et ux. v. Root et ux.—Opinion of Court.

---

---

tate in land in a *feme covert*, subject, as at common law, to the marital rights of the husband, except so far as the statutory rights of the husband correspond with his common law rights, unless the terms and conditions of the deed under which a separate estate is limited to the wife correspond with the common law marital rights of the husband and then the common law rights of the husband attach, not by virtue of his common law rights, but by and under the terms of the deed conveying the estate. If the estate is granted to the wife generally and not strictly as separate estate it becomes her separate statutory property, controlled by the provisions of the statute as distinct from the principles of the common law, applicable to a like estate, and the rules of interpretation to determine now whether the estate created by a deed to a married woman is her separate estate, or her separate statutory property, are those which before prevailed to determine whether it was her separate estate or an estate to which at common law the marital rights of the husband would attach.

That there may be in this State these two estates in a *feme covert* is distinctly recognized by the past judicial history of this State. The nature of these two estates, and the differences between the mode and method of acquiring them are, to a considerable extent, explained in the case of *Dollner, Potter & Co. vs. Snow et al.*, 16 Fla., 96. We will not here repeat what is there said. What we do say, however, in this opinion, is to some extent based upon the views there expressed. With this introduction as to the nature of these estates we reach the question.

Do the words in the premises and *habendum* and *tenendum* of these deeds create a separate estate in the wife?

The general rule as to which there is substantial uniformity upon this subject is that when property is conveyed to a married woman the presumption is that she is to take as

---

---

Harwood et ux. v. Root et ux.—Opinion of Court.

---

---

her separate statutory property, and to rebut this presumption and create a separate estate the intent must clearly and affirmatively appear upon a consideration of the whole instrument. The want of uniformity, however, in judicial decisions as to the effect of certain words in deeds is distressingly apparent to any one who will examine the reports of the several States of cases involving the interpretation of words used in deeds of this character. It has been well said that “words themselves are intangible and ever shifting formations in air, changing with their combinations, changing with the lapse of time, changing with the locality, effervescent, never to be exactly caught, yet always within and around us.” 1 Bishop, Married Women, 824. It is impossible, as is remarked by Bishop, that uniformity upon such a subject should prevail among judges surrounded by different influences, with different habits of thought, accustomed to hear and to read the utterances of divers minds.

We do not think that there is in these deeds any such clear, unambiguous language denying the marital rights of the husband as is necessary to create a separate estate.

In the case of Lippincott vs. Mitchell, 94 U. S., 767, the *habendum* and *tenendum* of the deed was “to have and to hold to the sole and proper use, benefit and behoof of her, her heirs and assigns forever.” We can see no essential difference between these words and those used in the deeds conveying the property here to Mrs. Root. Of this deed the Supreme Court of the United States says:

“If it were intended by this deed to give the wife a separate estate, it is remarkable that \* \* no words clearly apt for that purpose are to be found. It is remarkable, if such an intent existed, that the phrase, ‘for her separate use,’ or ‘for her exclusive use,’ or ‘free from the control of her present or any future husband,’ or some equivalent

---

---

Harwood et ux. v. Root et ux.—Opinion of Court.

---

---

for one of them, was not inserted. The omission can only be accounted for upon the hypothesis that the idea of a separate estate was not in the mind of either of the parties, and that hence no instruction upon the subject was given to the draftsman of the deed. There is nothing in the record to warrant the belief that the purchase and conveyance were not intended to be such a transaction in the ordinary way, without securing to the grantee any special rights touching the property, or any right other than that of the ownership in fee simple.

“The only part of the deed which gives a shadow of support to the proposition of the appellants is the language of the *habendum*.

“The same language is to be found in many precedents in books of forms, where, certainly, there was no purpose to create a separate estate. Thus, in Oliver on Conveyancing, an American work, in the form of a deed by an administrator, page 290, the *habendum* is, ‘To have and to hold the same to the said J. C. and W. W., their heirs and assigns, to their sole use and behoof forever.’ So, in the form of a deed to a corporation, Ib., 279, ‘To have and to hold the same, with the appurtenances thereof, to the said corporation and their assigns, to their sole use and behoof forever.’ Instances to the same effect in other like works might be largely multiplied.

“Such was also the ancient English form of the *habendum* except that the term ‘only’ was used instead of ‘sole.’

“In Lilly’s Practical Conveyancer, published in 1719, in the form of a release in fee, the *habendum* is, ‘To have and to hold the said,’ &c., ‘to the only proper use and behoof of the said C. C., his heirs and assigns forever.’ And such is the modern English form. Thus, in the form of a deed of feoffment, in 4 Blythewood, 130, the *habendum* is, ‘To



---

---

Harwood et ux. v. Root et ux.—Opinion of Court.

---

---

have and to hold the said close,' &c., 'to the only proper use of the said [feoffee,] his heirs and assigns forever.'

"We have examined the case upon the subject, referred to by the learned counsel for the appellants, and many others, both the English and American. Some of them go to a very extreme length in one direction, and some in the other. Not a few of them are in irreconcilable conflict. To examine and discuss them in detail would unnecessarily prolong this opinion, and could serve no useful purpose. We therefore forbear to remark further in regard to them.

"Without the aid of the rule of doubt recognized by all the authorities upon the subject, we have no difficulty in coming to the conclusion that the deed of Austill cannot be held to have vested in the grantee a separate estate, or any other estate than a fee simple."

It is useless to enter into any elaborate comparison of cases upon this subject for the differences cannot be reconciled. There is a wanting in these deeds that clear and manifest intention to exclude the marital rights of the husband which is necessary to create a strictly separate estate. The property, therefore, is the separate statutory property of the wife and the rights of all the parties here must be fixed by the Constitution and the statutes controlling the subject and the principles of equity controlling their interpretation, application and enforcement.

The wife not being subject to a personal judgment at law or in equity it follows that the remedy here, if there be one, is in equity against the rem.—the property. The plaintiffs, therefore, have sought the proper forum to enforce their rights. What is the general rule controlling this subject. It is that she is capable of charging such estate in equity the same as though it were held by a trustee with like limitation as to management and control as those contained in the Constitution and the statutes controlling the subject.

---

---

Harwood et ux. v. Root et ux.—Opinion of Court.

---

---

See the cases cited to 2 Bishop Married Women, §203, and the text.

Again, a wife may charge in equity her separate estate under circumstances in which a court of law would deem her personally bound by contract if she were *sole*. This is the substance which courts of equity have devised in place of the legal power to contract; that is, when a court of equity makes a married woman a *feme sole* as to her separate estate, it, instead of authorizing her to bind her person by contract, authorizes her to charge the estate in like manner as she would bind her person if she were unmarried. *The authority to charge the estate, therefore, is not an equitable substitute for the authority of a person in her own right to convey but a substitute for the authority to contract.*

In simple language, at law she cannot make a contract resulting in a personal judgment, while in equity she can contract, and if she can contract in equity she can charge her estate precisely as she could at law if she were a *feme sole* and *sui juris*.

A *feme covert* in a court of equity as to her separate statutory property has both the legal and the equitable title, and while under the statute she is not clothed with the rights of absolute dominion, it cannot be said that the investiture of the legal title in addition to the equitable interest which would be the measure of her rights if it was an estate vested in a trustee for her benefit, deprives her of the power to charge her estate if it is of such character as will permit the charge.

The general doctrine as to the separate estate of a married woman, and as to her power to bind or to charge her separate statutory property, so far as her power exists under the statute as well as under trusts, is that a married woman possessed of a separate estate is as to all matters pertaining to such estate, except where she is expressly limited by the

---

---

Harwood et ux. v. Root et ux.—Opinion of Court.

---

---

instrument which created it, or the statute under which she has title, regarded as a *feme sole*, and may charge or affect it by any act or contract which would be binding at law if she were unmarried. This is the doctrine stated by Mr. Chief-Justice Dixon in the case of Todd vs. Lee *et al.*, 15 Wis., 373. This case is well considered, all the English and American authorities are reviewed and the argument we think is conclusive.

In this case we have the husband and the wife incurring this debt and both pledging the separate statutory property. The husband under the statute is entitled to the rents and profits of the separate statutory property of the wife, and to the extent that each of them could bind this property without a mortgage or a pledge they have done so. The credit here according to this bill was extended upon the basis of the property which is sought to be charged. Both the husband and the wife agree that it should be bound and the husband was well known to be insolvent. There can be no doubt of the husband's liability at law, and as he is insolvent his interest and that of his wife should be controlled to pay this debt. The rule prevailing in a court of equity, however, in a case such as this, is to sequester the rents and profits of the property, rather than to sell the corpus or body of the estate. This is the rule which would prevail in equity as to an estate with limitations like those contained in our statute, and we cannot conclude otherwise than that it should prevail here. North American Coal Company vs. Dyett, 7 Paige, 15.

The wife's property is not here subjected to the husband's debt. The property is made responsible for her debt incurred for property to be her separate statutory property and the rents and profits are applied to a debt primarily the wife's because the husband was a party to the contract and agreement to bind it and gave his assent to it. For a court

---

---

Matthews et al. v. Lindsay et als.—Syllabus.

---

---

of equity to do otherwise would be to sanction an iniquitous fraud.

The decree herein rendered is reversed and the case will be remanded with directions to appoint a receiver to take charge of the estate described in the bill and by its management and from the rents and profits to be realized therefrom to discharge the debt of the plaintiffs, unless the defendants wish to take issue upon the facts alleged in the bill, which they may do by proper pleadings, and there may be such other proceedings as are consistent with the opinion herein rendered and conformable to the principles of equity.

---

JOHN O. MATTHEWS ET AL., APPELLANTS, VS. WM. B. LINDSAY ET ALS., APPELLEES.

1. A tender of money due upon a promissory note or other contract is ineffectual unless followed by *proferri in curia*.
2. A mortgage is a security only, and is not extinguished by a tender after the day the money becomes due; and unless the tender is kept good and the money brought into court it will not stop the accruing of interest nor relieve from costs of suit. A purchase, therefore, at a sale under an execution against a mortgagor, the tender not being kept good, will not give the purchaser a title free of the mortgage.
3. A prayer by cross bill for a partition, in a suit brought to foreclose a mortgage, cannot be entertained.
4. A set-off is allowed in an action on contract, only of matters growing out of contract. Damages sustained by reason of annoying suits, malicious prosecutions, slander of title, injury to one's credit occasioned by such proceedings, though relating to the subject matter of plaintiff's suit, cannot be set off.
5. It is within the sound discretion of the Chancellor to receive evidence at the hearing not introduced before the Master.

---

---

Matthews et al. v. Lindsay et als.—Statement of Case.

---

---

6. Though a Chancellor may have erred in allowing an original deed to be put in evidence without proving its execution, yet where the pleadings and other evidence are such that the introduction of the original was immaterial and unnecessary to a proper disposition of the case and did not affect the decree, the error will be disregarded.
7. The finding of the fact of the delivery and acceptance of the deeds of partition in this case, being supported by a strong preponderance of testimony, must be affirmed.

Appeal from the Circuit Court for Marion county.

Bill to foreclose a mortgage. The case of Lindsay vs. Matthews, 17 Fla., 575, contains a history of the mortgage. One Cole owned about 150 acres of land in Marion county, and sold the same to Matthews in 1873. Matthews borrowed the money to make the purchase from Robinson, and to secure Robinson had the land conveyed to him by Cole. In 1874 Matthews sold an undivided half to Vinson, who took a deed from Robinson, and in 1875 Vinson sold and conveyed this undivided half to these complainants, Lindsay and others. In February, 1875, Matthews borrowed from Church \$2,100 to pay Robinson, for which he gave Church his note payable March 1, 1877, with interest at 8 per cent., and Robinson conveyed to Church the other undivided half of the land at Matthews' request, to secure Church, who gave Matthews a written agreement to convey to Matthews on his paying the note at maturity, the agreement reciting the fact that Church held the land as security for Matthews' note.

The appellants purchased the interest of Church in November, 1876, taking an assignment of the note and a conveyance of the land by deed subject to the rights of Matthews. In the case in the 17th Fla., the question was whether appellants, grantees of Church, were owners in fee, Matthews having failed to pay the money at the time it

---

---

**Matthews et al. v. Lindsay et al.—Statement of Case.**

---

---

was due, or were the assignees of a mortgage interest, and it was held that they had a mortgage interest only.

This suit was then brought by Lindsay to foreclose this mortgage, Harris being made a party as having or claiming the interest of Matthews and as purchaser under an execution against him.

The bill alleged that in 1875 complainants and Matthews divided the property, and executed and delivered quit claim deeds to each other. Matthews conveying to complainants his interest in the westerly ninety-one acres, and they conveying to him seventy-nine acres east of a designated line. Complainants claim their mortgage lien covers, under the division so made, a large part of Matthews' 79 acres which they pray may be sold to satisfy the amount due them on the note and mortgage.

The defendant, Matthews, admitted the execution of the note and mortgage by himself to John Church, and the transfer of the same to the complainant by Church, but says that a short time after the maturity of the mortgage debt he tendered to the complainants the full amount of the mortgage debt; but they refused to receive the same, alleging as a reason that Stewart, one of the complainants, to whom the tender was made, could not accept the money until he could see Lindsay. Matthews again tendered the money to Albert S. Kells, one of the complainants, and he refused to receive it, alleging as a reason for his refusal that they, the complainants, held an absolute title to the land, and not a mortgage upon it, and would not accept the money and cancel the mortgage. Matthews' cross bill alleges that after the aforesaid tenders made by him, complainants, intending to defraud him, brought an action of unlawful detainer against him to dispossess him of the land. That being unable successfully to defend said suit at law, he was forced to file a bill in chancery, and was

---

---

Matthews et al. v. Lindsay et als.—Statement of Case.

---

---

thereby compelled to incur large expense and cost in and about maintaining his rights in the premises. That pending this litigation the fraudulent claim of the appellees greatly damaged the appellant, Matthews, by casting a cloud upon his title, preventing him from selling any part of the property, or raising money with which to improve it; and that they caused his land to be sold at sheriff sale, and by claiming that they had good title to it, and so announcing at the sale, caused the property to sell for an amount greatly less than its value. His cross bill prayed that he be allowed to set off this damage thus sustained by him against the mortgage debt.

Appellees demurred to this answer and cross bill, and the court sustained the demurrer and struck out so much thereof as asked to set off the damage, etc.

The defendant, Harris, one of the appellants, set up his defence that after the decree rendered by the court in chancery, cause of Matthews vs. Lindsay *et al.*, above referred to, and while said decree was of force and not superseded, he purchased all the interests of Matthews in said mortgaged lands under and by virtue of a sheriff's sale under sundry executions against Matthews; that at the time of his purchase the mortgage lien on the property had been divested by reason of tenders made by Matthews pursuant to the decree of the court, said decree then being of force and not superseded; and that appellees could not assert a mortgage lien against the land. He also charges that the mortgage lien had previously been divested by reason of former tenders made by Matthews. He also prayed a partition of the land, alleging that there never had been a partition between Matthews and appellees; and that appellees were then in possession of about four acres of the land to which he acquired title under said sheriff's sale, etc. His answer and cross bill prayed injunction to restrain appellees from

---

---

Matthews et al. v. Lindsay et als.—Statement of Case.

---

---

gathering the oranges growing upon the strip of land in controversy, and the court granted the injunction. Harris' answer also showed that there never had been a partition of the land between Matthews and the appellees; that mutual quit claim deeds had been executed by them and left in escrow to be delivered when a survey should have been made to verify the line as mentioned in said deeds as the dividing line; in order to make the same accord with an agreement for division previously made between them, by which for the purpose of an equitable partition it was stipulated that appellees should have six acres of land more than Matthews. That in the deed so left in escrow the draftsman had made a mistake, and in dividing the land gave to appellees twelve acres more than Matthews. That appellees by fraud obtained possession of the deeds; and placed that from Matthews to them on record, but kept that from them to Matthews for about five years, and filed it in the clerk's office on the day of commencing this suit. He prayed a cancellation of the deeds, etc.

Appellees demurred to this answer and cross bill, and the court sustained the demurrer, and struck from the answer and cross bill all that portion which prayed for partition of the land, etc.

The appellant, Matthews, then applied to the court for leave to file an amended answer and cross bill, but the court refused the motion. The cause having been referred to a master after the same was at issue, the master reported in favor of the appellants upon all the issues raised by the pleadings before him. Appellees filed exceptions to the report and upon final hearing the court sustained the exceptions and rendered a final decree in favor of the appellees.

From this final decree an appeal was taken and errors duly assigned.



---

---

Matthews et al. v. Lindsay et als.—Argument of Counsel.

---

---

*S. D. McConnell* for Appellants.

*Fleming & Daniel* on same side.

We will consider the grounds of appeal in the order in which they appear in the assignment of errors.

1st. The court in sustaining the demurrer to the answer and cross bill of James A. Harris.

The defence set up in Harris' answer and cross bill was that the lien of the mortgage to Lindsay and others had been divested by the tenders made by Matthews before the decree of the court in the suit of Matthews vs. Lindsay and others, and by the tender made subsequent to the decree and by the direction of the Circuit Court, and that while the decree of the Circuit Court was of force and not superseded he purchased the mortgaged lands at sheriff sale by virtue of executions issued on divers judgments against Matthews, one of which antedated the mortgage itself; that the land had never been partitioned as between Matthews and complainants, that the deeds by which it was claimed the lands had been divided had never been delivered, but obtained by the complainants by fraud, and there being no partition the foreclosure suit could not be maintained because the land would have to be partitioned before it could be sold as prayed for in the bill, and a suit for foreclosure and partition cannot be joined in the same bill.

The decree of Judge Dawkins in the case referred to, to wit: that the lien of the mortgage should cease on the tender of the amount due on the mortgage within sixty days from date of said decree and refusal of the same was not superseded at the date of the sheriff's sale to Harris because to supersede a decree a bond must be given with one or more sureties. McClellan's Digest, page 167, sec. 2; Ib., page 840, sec. 3.

---

---

Matthews et al. v. Lindsay et als.—Argument of Counsel.

---

---

In this case there was no proper bond. This bond filed was an illegal bond and in violation of Rule 5th of the Rules for the government of the Circuit Court, which is as follows: "No attorney or other officer of the court shall enter himself or be taken as bail in any criminal case or as security in attachment, appeal or writ of error or other proceedings in court, on pain of being considered in contempt and of having the proceedings dismissed on account thereof." Rules of Court, art. 1, sec. 5, page 9.

"Under the statute regulating appeals in chancery from final or interlocutory decrees a bond is not necessary to perfect an appeal. The only result attending a failure to give bond under the statute is that the appeal does not operate as a supersedeas." *Kilbee & Barnes vs. Marie Myrick*, 12th Fla., 416.

To show that the goods were not delivered we refer to the testimony of Matthews, Harris and Ball. Matthews' testimony, 176; Harris' testimony, 260, 261; Ball's testimony, 474, 478.

Lindsay makes no satisfactory explanation of how he got the deeds. That he obtained the deed to Matthews for a wicked and fraudulent purpose is apparent. He had concluded to ignore his contracts with Matthews and claim the fee in the land he had previously recognized as Matthews'. It was very important to the success of this nefarious project that he should obtain possession of the deed which he and his associates had executed to Matthews. This being done they commenced their suit for possession. See Lindsay's testimony, pages 833, 339.

Lindsay says that he had no purpose to serve, but the facts and circumstances show that he did have a fraudulent design in suppressing the deed. When this court declared the instrument he was relying on was a mortgage, and that his game was of no use, it would not work, it

---

---

Matthews et al. v. Lindsay et als.—Argument of Counsel.

---

---

could not win, he sent the deed to his attorney, Mr. Reardon, to be recorded.

Matthews had nothing to do with the recording of the deeds. He had not in truth and in fact, and certainly the evidence does not show that he had.

But the recording of a deed while in escrow is not equivalent to delivery. See 32 Vt., 341.

If the deeds were not delivered there was no partition and the court erred in holding that there was a partition. If there was not, the specific land could not be sold under the mortgage. And foreclosure and partition cannot be united in one suit. Buckmaster vs. Kelly, 15th Fla., 199.

The facts and the law relating to the tenders we will discuss under the second ground of appeal, which is:

Second. That the court erred in sustaining the demurrer to the answer and cross bill of the defendant, Matthews.

The first defence sought to be set up in the answer and cross bill of Matthews was the various tenders whereby the lien of the mortgage was divested.

At common law a tender made at the law and refused satisfied the condition of the mortgage as fully as if payment had been made and reverts the estate in the mortgagor, who may enter forthwith. 2 Jones on Mortgages, sec. 891.

The rule in New York and Michigan is that a tender of the amount due on a mortgage after the day fixed for payment is a discharge of the lien just as much as payment is, and in the same way that a tender at common law made upon the day named in the condition for payment has this effect. The lien of the mortgage is thereby *ipso facto* discharged and the holder of the mortgage can only look to the personal responsibility of the person liable for the mortgage debt. To have this effect it is not even necessary that the money be brought into court, or that it should be shown

---

---

Matthews et al. v. Lindsay et als.—Argument of Counsel.

---

---

that the tender has ever since been kept good. This view of the effect of a tender made after the law day is founded upon the departure made from the common law doctrine that the mortgage creates an estate in fee in the mortgagee subject to be defeated by the performance of the condition, the mortgage being regarded merely as a pledge of the land of which the mortgagor remains the owner, the tender after breach of the condition is regarded as having the same result as a tender made in case of a pledge of personal property, in respect to which the rule is that a tender and refusal at any time of the full amount of the debt extinguishes the lien of the pledge. 2 Jones on Mortgages, sec. 893; Kortright vs. Cady, 21 N. Y., 343.

Our law in regard to the force and effect of a mortgage being similiar to that of New York, we think this court can have no hesitation in adopting the rule established in Kortright vs. Cady.

The testimony shows that there were three tenders made.

The first made by Matthews thirty-five days after the maturity of the notes secured by the mortgage.

Second tender made by Dunn on the 24th day of May, 1877, previous to any suit between the parties.

Third tender subsequent to suit and under decree of July 29th, 1878, when \$2,505.06 was tendered.

We contend that the first tender was sufficient. It is not shown that the money was counted out, but there was an offer to pay and refusal.

Where certain tax commissioners refused an offer to pay taxes, and it was claimed that no actual tender had been made, the Supreme Court of the United States held that "the law does not require the doing of a nugatory act as would have been a formal tender of payment after the action of the commissioners declining to receive the taxes

---

Matthews et al. v. Lindsay et als.—Argument of Counsel.

---

from any person in behalf of the owner.” Tracey vs. Irwin, 18 Wall., 551; referring to 10 Peters, 1, and 9 Wall., 326; 2d Wash. on Real Prop., page 165.

Why will not the same principle apply in this case? The mortgagees refused to receive the money due. In the first instance because Stewart, to whom the offer to pay was made, could not accept payment without first consulting Lindsay. And in the second instance they declined because they had come to the conclusion that they held the fee. Did not these refusals make a formal tender unnecessary? A mere formal tender would have been a nugatory act, which the law does not require.

The second defence was an attempt to set-off unliquidated damages.

“The right to an offset in chancery exists independent of the statute and is controlled only by the general principles of equity.” Jeffreys vs. Evans, 6 B. Monroe, 119, cited in 43 Am. Decis., 158.

Upon a bill to foreclose the mortgagor is allowed to set-off a debt due him by complainant, not only in cases where this would be allowed in actions at law, but also in cases of peculiar equity not strictly within rules of law. 2 Jones on mortgage, §1496.

Courts of chancery, will under circumstances of peculiar equity, entertain a bill for an offset and liquidate the matter or allow the party to proceed at law and obtain a liquidation and then decree an offset. Amr’s of Smith vs. Amr’s of Wainwright, 24 Vt., 105.

Upon the foreclosure of a mortgage by a bill in equity the defendant may set-off the demand he has against the complainant which would be the proper subject of the set-off in a suit brought by the complainant at law to recover the amount due upon his mortgage. Waterman on Set-offs,

---

Matthews et al. v. Lindsay et als.—Argument of Counsel.

---

2d Ed., §426, (1 Ed., 390); Chapman vs. Robertson, 6 Paige, 627; Holden vs. Gilbers, 7 Paige, 203.

Our statute on this subject of set-off in suits of law is: "All debts or demands mutually existing between the parties at the commencement of the action, whether the same be liquidated or not shall be proper subjects of set-off." McC's. Dig., p. 831, §82.

The set-off sought to be made a defence in this suit is a peculiar one and probably no such condition of facts was ever before presented to a court.

Damages growing out of the very transaction, the complainants in this suit contending at one time that the instrument now declared upon as a mortgage was an absolute deed standing and clouding the title of Matthews, institutes a suit to dispossess him and fraudulently suppressing papers which showed their former acknowledgment of the fee in him, and thus obstructing and preventing his use of the property. Surely a demand growing out of such injuries and existing at the commencement of this suit though unliquidated would be a proper subject of set-off under the statute. And if in law then in equity.

The third ground of appeal is embraced in the second.

The amended answer sought to be set up the same defence, but more at length.

The fourth ground we will not discuss. We are inclined to the opinion that the Chancellor, at any time before the close of the final hearing, can admit at his discretion testimony from either side.

The fifth ground of appeal is: "That the court erred in admitting in evidence, on the objection of the solicitor for defendant, the original deed from John O. Matthews to Lindsay and others.

That this deed was improperly admitted is determined

---

---

Matthews et al. v. Lindsay et als.—Opinion of Court.

---

---

by the decisions of this court in *Hogans vs. Carruth*, 18 Fla., 587; *Stewart vs. Stewart*, 19 Fla., 846.

The sixth and seventh grounds of appeal are included in the errors already considered.

In conclusion we contend that the court below has not done what it set out to do, that is to establish the interests of the respective parties as indicated by the agreement of December 3, 1875.

White's survey runs with angle of 7. 46. 15 east, and makes six acres in the triangle.

Survey of Richards and White starting from same point runs first with angle of 11.10, and makes six acres in triangle the second with an angle of 5.6 to make the difference in the pieces west and east of the dividing line six acres.

The order was to run and ascertain a true and correct dividing line between the parties according to the agreement of December 3, 1875.

We contend that this agreement construed in the light of the weight of the testimony means that the difference between the pieces should be six acres and not twelve as determined by the court below.

*John G. Reardon and George P. Raney* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

The first ground on which appellants pray a reversal of the decree is that the court erred in sustaining the demurrer to Harris' cross bill. This cross bill alleged that by the tenders by Matthews the lien of the mortgage was extinguished; that he had become the owner of Matthews' interest by his sheriff's deed under executions against Matthews, and he prayed a partition as between himself and complainants.

As to the tenders, without examining the question as to

---

---

**Matthews et al. v. Lindsay et als.—Opinion of Court.**

---

---

the amount tendered, the allegations and proofs show that Matthews offered complainants the money, but the tender was not followed by a *profert in curia*. Such a tender was held to be ineffectual in *Spann vs. Baltzell*, 1 Fla., 301; *Forcheimer vs. Holly*, 14 Fla., 239; Co. Litt., 207, *a*. But it is argued that the tender discharged the mortgage.

A mortgage is but a security for the payment of the debt mentioned in it. That which discharges the debt will discharge the mortgage lien. To discharge the debt by a tender, such tender must be kept good, and a plea of tender, as has been decided in the above cited cases, is ineffectual unless it appear that the creditor can have his money when he wants it. "It ought to appear that the mortgagor from that time [of the tender] always kept the money ready," otherwise the interest will run on. *Gyles vs. Hall*, 2 P. Wms., 378, per Lord Chancellor Hardwicke. Should the mortgagee, after tender and refusal, demand his money and find the mortgagor not ready to pay in accordance with his previous tender, interest will run on as if no tender had been made, until the money is paid or brought into court. *Columbian B. Asso. vs. Crump*, 42 Md., 192.

"The appropriate office of a tender is to relieve the debtor from subsequently accruing interest and the costs of enforcing, by a suit, the obligation which by the tender of payment he was willing to perform. The debt still remains. \* \* \* The tender does not pay or discharge the debt; and though it will avail to arrest the accruing of interest and to free the debtor from costs, it will be deprived of that efficacy by a subsequent demand and refusal. If legal analogy is to be pursued, it could lead no further than to deprive the mortgage of operation beyond the amount due when the tender was made, leaving the question of subsequently accruing interest and costs to be varied by the subsequent demand and refusal. The instances



---

---

Matthews et al. v. Lindsay et als.—Opinion of Court.

---

---

in which a tender and refusal amount to payment and will operate as an extinguishment, are those in which the obligation is in the nature of a gratuity, without any precedent debt or duty, and the discharge is an accidental and not a necessary consequence of the tender and refusal, there being no debt or duty remaining whereon to ground an action." 6 Bac. Abr., 456, *tit. Tender*; Shields vs. Lozear, 34 N. J. L., 505-6.

The rule prevailing in New York and in Michigan that a tender after a debt became due operates to discharge the mortgage and to leave the mortgagee only a personal remedy for his debt, has not been adopted in other States. Says the court in Crain vs. McGoon, 86 Ill., 433: "We fail to appreciate why a court of equity, while interposing its authority to mitigate the rigor of the common law rule against the mortgagor, should, at the same time, extend and make more rigorous the rule against the mortgagee. We do not perceive how this can be said to be in pursuance of the natural principles of justice. If a tender is made but not accepted, and is kept good, it is plainly right that the mortgagee shall have only the tender. The mortgagor has been deprived of the use of his money and the mortgagee has had ample time to reflect upon his rights and has been at liberty to have them, whenever he would, by the acceptance of the tender. But when the tender is not kept good the mortgagor has the use of the money and the mortgagee, however ill advised he may have been at the time of tender, has no opportunity for revising and reconsidering his judgment and thereafter accepting the money tendered. \* \* When it is reflected that no serious hardship is imposed on a party making a tender by requiring him to keep it good, it would seem clearly unjust, under circumstances like those alluded to, to require a party to whom a tender is made, after the day

---

---

Matthews et al. v. Lindsay et als.—Opinion of Court.

---

---

of payment has passed, to elect at once to accept or reject it, at the peril of losing his security if he misjudges as to his rights. \* \* The policy of the courts of equity is against forfeitures; and in this State, to discharge the mortgage would be, in very many instances, in effect to forfeit the debt. We think the preferable rule is, where the tender is made after the day the debt secured by the mortgage is due, to require that it shall be kept good in order that it may operate to discharge the mortgage.”

A tender, to be effectual, as has been decided in this State, must be kept good; there must be *profert in curia*. Otherwise the debt is not discharged, nor is the interest stopped. If a mere tender and refusal of it operates to discharge the debt or the security, a subsequent demand or an offer to accept the money would not create a right of action at law or in equity, because the debt has ceased to exist as the result of the tender. If there be a tender and a refusal of it, and the creditor afterwards sues, a plea of tender with *profert* and bringing the money tendered into court will give effect to the tender and extinguish the debt and the security.

As to Harris' title under the sheriff's deed, while it may be good as against Matthews, (though we cannot determine it here) yet it cannot avail as against the mortgage. Matthews never had a title or right which was not from its inception subject to the payment of the money demanded by complainants.

As to the prayer by Harris for a partition, it cannot be entertained in this suit brought to foreclose a mortgage on the very land he claims. *Buckmaster vs. Kelly*, 15 Fla., 199; *Mattair vs. Payne*, Id., 685. The cross bill seeks to put in issue and establish his legal title. This must in all such cases be established or unquestionable before partition can be had.

---

---

Matthews et al. v. Lindsay et als.—Opinion of Court.

---

---

The second error alleged is in sustaining the demurrer to Matthews' cross bill. This cross bill alleges that by reason of the refusal of complainants to accept the tenders and their assertion of title, their bringing suit against him to recover possession under their mortgage, driving him to bring suit to enjoin their suits at law, slandering and clouding his title and destroying his credit, and putting him to great trouble, annoyance and expense in defending and prosecuting his rights, all on account of the illegitimate and wrongful claims and conduct of the complainants under the mortgage, he has sustained great damage and expended large sums of money, to an amount larger than their demand, and prays that the same may be set-off against the mortgage debt. The claims sought to be set-off are for *tort*. It is not a debt or demand capable of computation as in matters of contract. Damages arising out of tort are not the subject of set-off, either at law or in equity. 7 Wait's Act. & Def., 483, and citations. Our statute prescribes that debts or demands mutually existing between the parties shall be proper subjects of set-off. A set-off can be allowed in an action on contract of matters only growing out of contract. Robinson vs. L'Engle, 13 Fla., 482.

The third ground of error is the refusal of the court to allow Matthews to file an amendment to his answer. The amendment offered was a repetition, in more detail, of his plea of set-off and it was rightly refused.

The fourth ground of appeal is that the court allowed complainants' solicitors to read upon the final hearing a copy of the record of the judgment of Williams vs. Matthews, as it had not been offered in evidence before the Master who took the testimony. This was within the discretion of the court. 1 Daniel Pr., 890. But even if the court had been wrong, the paper offered was of no consequence and the existence of the record of the judgment was

---

---

Matthews et al. v. Lindsay et als.—Opinion of Court.

---

---

immaterial for any purpose in this case and no error in the decree was occasioned by putting in the paper.

The fifth ground is the admission in evidence of the original deed of Matthews to complainants without proof of its execution. This might have been error if it was material to have the original deed before the court for the purposes of the case. The defendants had in their pleadings and in Matthews' testimony admitted the execution of the deed, though denying its *delivery* to complainants. The deed itself if proved did not show anything not admitted by defendants in their answers, to wit: that it had been signed, and the description of the land. The question of its delivery was fully investigated without its presence, its existence and contents being admitted by both parties. Its introduction having been unnecessary and immaterial to either party, no error in the decree did or could flow from it.

The sixth and seventh grounds are the sustaining the exceptions to the report of the master and in rendering the final decree against the defendants.

These grounds involve a consideration of the whole evidence material to the case. The record is comprised of over 550 pages and we have read and considered the whole of it, but we cannot be expected to quote or recapitulate it. It would unnecessarily swell the volume of the report of the case without benefit to any one.

The master reported in favor of the defendants. The Chancellor took an opposite view of the case, set aside the conclusions of the master and decreed the prayer of the complainants.

Our conclusions are that the complainants established their mortgage and the debt secured by it; that the debt remains unsatisfied; that Matthews' several tenders were ineffectual to destroy the lien of the mortgage or to abate

---

Matthews et al. v. Lindsay et als.—Opinion of Court.

---

the interest accruing after tender for the reason that the tender was not kept good by paying the money into court. The defendant cannot be allowed thus to destroy the mortgage and keep his money beside.

The parties had made and signed December 3, 1875, an agreement in writing to make a partition of their joint possessions; a survey was made of which both parties had copies written by Matthews and the one in the hands of complainants is certified by Matthews to be a true copy, which bears date December 6th, 1875, on the back of which are figures in Matthews' handwriting indicating the quantity of land each party would get by the division line as run by the surveyor, to wit: 91 and 79; the quit claim deeds executed by the parties December 25, 1875, were drawn in the handwriting of Matthews, describing the division line as in the surveyor's certificate, conveying to complainants ninety-one acres, and to Matthews seventy-nine acres; both parties occupying and improving thereafter on their respective sides of this line; complainants building a fence on the line in the presence of Matthews without his objecting; all these facts, fully established by the proofs, show that the deeds were the deliberate acts of the parties. But Mr. Matthews says that according to their agreement of December 3, 1875, complainants were to have but six acres more than himself and that the deeds after being executed were not delivered to the respective releasees, but were mutually delivered to a custodian in escrow, and not to be delivered until a satisfactory survey should be made, and knew nothing of any survey being made after the agreement, and before executing the deeds. But the facts appear that he drew up the deeds from a definite certified survey on December 25, copying the description of the dividing line from the surveyor's certificate dated December 6th, 1875, some days

---

---

**Jefferson County v. B. C. Lewis & Sons—Syllabus.**

---

---

after the date of the agreement to make division, the deeds specifying the acres in each portion conveyed.

The proof is overwhelming that the deeds were delivered to and received by the respective releasees after being executed, and afterwards on the same day were delivered by then severally to a third party for safe-keeping, not in escrow, with no condition except they were to be kept till called for. Both deeds were afterwards delivered by mistake by the depositary to one of the complainants, who carried them away and who sent the deed executed by complainants, as soon as he discovered he had it, to a person in Ocala to be delivered to Mr. Matthews and it was subsequently left at the clerk's office for him, where he found it. Again, Mr. Matthews, after this, drew up a mortgage from himself to another party on the land, describing it as seventy-nine acres, not as an undivided half of any parcel, but as his several property. He also testifies that his attention was first called to the fact that his deed called for seventy-nine acres only, instead of what he was entitled to, several years afterwards by his attorney and about the time the bill in this case was filed. There is a large mass of testimony in the record to which it is unnecessary to refer farther.

According to the whole evidence the delivery and acceptance of the deeds is proved by a very strong preponderance of evidence: such a preponderance as would inevitably control the verdict of a jury.

The decree is affirmed.

---

**THE COUNTY OF JEFFERSON. PLAINTIFF IN ERROR. vs. B. C. LEWIS & SONS. DEFENDANTS IN ERROR.**

1. In declaring against a county or municipal corporation which has no general authority to issue bonds, in a suit upon bonds issued under a special act of the Legislature, (to-wit: the 22d section of

---

---

**Jefferson County v. B. C. Lewis & Sons—Syllabus.**

---

---

the Internal Improvement act of 1855, which does not designate any particular county,) the power to issue the bonds must appear by distinct averment of the special authority conferring the right, unless such special authority appears by the bond annexed to the declaration.

2. When upon a motion to strike out a plea for want of sufficient verification, the court in deciding the motion expresses an opinion as to the effect of the verification upon a question which may arise upon the trial, an exception does not lie to such opinion, it being not material upon the motion to strike out, though it may be material when evidence is tendered.
3. The question, whether a person drawn as a juror is sufficiently intelligent to sit in a case, may be determined by the court in the exercise of sound discretion.
4. In a suit against a county upon its bonds, when the validity of the bonds is in question, a holder of similar bonds may be challenged for cause when drawn as a juror. Being interested in the question to be tried is cause of bias as a matter of law.
5. Under the Constitution of this State in force in 1857, the Judge of Probate was lawfully made a County Commissioner by act of the Legislature.
6. Bonds of a county did not, upon their face, recite the authority of law under which they were issued. The record of the proceedings of the Board at the time the bonds were ordered to be issued recited: "Be it known that after public notice duly given the question was submitted to a vote of the legal voters of Jefferson county, on the 7th of May last, whether this county should subscribe for stock in the Pensacola and Georgia Railroad Company, and it was decided in favor of such subscription by a majority of 278 votes out of 297, being all the votes polled. Now, therefore, the Board of County Commissioners of Jefferson county, by virtue of the said vote and of the power and authority on them conferred by 'an act to provide for and encourage a liberal system of Internal Improvements,' approved 6th January, 1855, have determined to subscribe," &c.: *Held*, (the Pen. & Ga. R. R. being one of the roads contemplated in the act,) that as against a *bona fide* holder of the bonds, this recital in the record of their proceedings by the Commissioners estopped the county to deny that the election was duly held according to law and that the Board subscribed for stock as stated in the record.
7. The rate of interest contracted to be paid attends the contract un-

---

Jefferson County v. B. C. Lewis & Sons—Statement of Case.

---

til the principal is paid or the contract extinguished, where the debtor has violated his agreement to pay by a certain day. Any other rule might make it profitable to violate contracts, a doctrine not conducive to commercial morality and integrity.

8. In 1857 counties had no official seal. The seal of the Judge of Probate or any other device in the form of a seal attached to a county bond was a good sealing.

Writ of Error to the Circuit Court for Jefferson county.

The following is a copy of one of the bonds sued on:

STATE OF FLORIDA, COUNTY OF JEFFERSON.

\$500.

No. 228.

The County of Jefferson hereby acknowledges itself indebted to the bearer in the sum of five hundred dollars, to be paid at the Court-house in the town of Monticello, on the first day of January, in the year of our Lord one thousand, eight hundred and seventy-seven, with interest thereon at the rate of eight per cent. per annum from the first day of January, 1857, payable annually, on presenting the corresponding coupon hereunto annexed, signed by the President of the Board of County Commissioners of said county, for the payment whereof the faith and resources of said county are hereby pledged.

IN WITNESS WHEREOF, the Judge of Probate, who is ex-officio President of the Board of County Commissioners for said county, has hereunto set his hand and affixed the impress of his seal of office, this twenty-fourth day of January, in the year of our Lord one thousand eight hundred and fifty-seven.

THOMAS J. CHASE,

Judge of Probate and ex-officio President of the Board of County Commissioners.

Attest: SAMUEL PULESTON,  
County Treasurer.

Issued in pursuance of an order of the Board of County Commissioners passed on the 10th day of January, A. D. 1857.

The affidavit to the pleas, the "motion to strike," and the order thereupon, are as follows:

Before the undersigned Clerk of the Circuit Court in and

SUBSCRIPTION TO PEN. & GEO. R. R. CO., BY VOTE OF COUNTY.

CONVERTIBLE INTO STOCK OF THE COMPANY.



---

**Jefferson County v. B. C. Lewis & Sons—Statement of Case.**

---

for said county came Charles T. Carroll, one of the County Commissioners of Jefferson county, and Chairman of the Board, who being duly sworn says that he has been duly appointed agent of the defendant for the purpose of this suit; that the foregoing pleas have been adopted by the County Commissioners acting for said county in support of their defence to plaintiff's action; that he verily believes that the said pleas are proper pleas to present their defence; that they are offered in good faith and not for the purpose of delay; that the facts upon which they rest are true except such as are stated upon information and belief, and as to such facts he verily believes the same to be true after careful inquiry and examination made by himself and the other County Commissioners of said county.

C. T. CARROLL,

Chairman Board County Commissioners.

Sworn to and subscribed before me this 7th January,  
1884.

W. C. BIRD,

Clerk Jefferson Circuit Court.

The plaintiffs in the above entitled suit move the court to strike out the pleas filed therein by the defendant because said pleas are not sworn to in the manner required by the statute and rules of court in and for such cases made and provided.—March 6th, 1884.

HENDERSON & MALONE,

Attorneys for Plaintiffs.

Motion overruled, but the court is of the opinion that the verification of the pleas is not sufficient to require the plaintiffs to prove the execution of the bonds mentioned in the declaration, and rules and orders that the plaintiffs shall be not required to make due proof on the trial.—March 6th, 1884.

The other facts are stated in the opinion.

---

---

Jefferson County v. B. C. Lewis & Sons—Argument of Counsel.

---

---

*S. Pasco* for Appellant.

The defendants in appeal brought suit at September Rule Day, 1883, against Jefferson county to recover \$50,000 damages upon certain alleged obligations of the county, 77 in number, some in the sum of \$500, others in the sum of \$100 each. It was not alleged in the declaration that these bonds were issued by statutory authority or by a vote of the people. Copies of the papers sued upon were filed with the declaration, but they contained no recital of any authority for their issue. They purported to be signed by the Judge of Probate of the county and to be attested by the County Treasurer, and were sealed with the seal of the then Probate Court. The defendant below demurred to the declaration because of the absence of the allegations relating to legislative authority, but the demurrer was overruled and said defendant pleaded.

An effort was made to strike out the pleas upon the ground that the affidavit was insufficient. The motion was overruled, but the court included in its judgment upon the motion that the pleas as sworn to were not sufficient to throw the burden of proof upon the plaintiff below. Issue was joined, a jury was sworn and the trial proceeded; before judgment 65 bonds were withdrawn from the suit, some before the trial commenced, others after the jury had been charged and because the charge was adverse to the class of bonds to which they belonged. Twelve bonds remained of the face value of \$6,000, and judgment was rendered for this amount, and interest and costs. Time was allowed after adjournment of court to prepare a bill of exceptions, and it was in due time signed, including certain exceptions taken during the progress of the case to the action of the court in admitting and excluding jurors, in admitting and excluding testimony, in charging and refusing

---

**Jefferson County v. B. C. Lewis & Sons—Argument of Counsel.**

---

to charge the jury upon certain questions of law and in certain other matters connected with the case, all which appear of record.

The case was afterwards brought to this court by writ of error, and the defendant in appeal has entered a voluntary appearance. The errors alleged against which plaintiff seeks relief are included in the assignment on file, and the attention of this honorable court is here directed to the same.

*1 and 2. As to Demurrer to Declaration.* A county cannot subscribe for stock in a public improvement, unless authorized to do so by legislative authority. The authority to issue bonds to raise funds for such improvements must be alleged in the declaration or appear upon the face of the bonds. It appears in neither declaration nor cause of action in the case at bar. *Thompson vs. Lee Co.*, 3 Wallace, 327, 330; *Marsh v. Fulton Co.*, 10 Wall., 676, 682; *Mayor vs. Ray*, 19 Wallace, 475; *Allen vs. Louisiana*, 103 U. S., 80; *Hennard vs. Cass Co.*, 3 Dillon, (C. Ct.) 147; *Thayer vs. Montgomery Co.*, 3 Dillon, 389; *McClure vs. Township of Oxford*, 94 U. S., 429, 432.

*3 and 4. As to Verification of Pleas.* This action of the court seems to be based upon the idea that the affidavit to the pleas was in conformity with the later statute, the Constitution and rule of court, but that it did not satisfy the old statute. We are before the only tribunal that can declare the law upon this point. We think our verification is strong enough to cover the requirements of the statute of 1828. No form has ever been laid down by the judiciary or the Legislature. *McClellan's Dig.*, 822, §38; *Ib.*, 832, §85; *Cons.*, art. 6, sec. 14, *Rule of Ct.* 15, p. 11.

*5 and 6. As to the Effect of the Educational Clause in our Jury Laws.* Stanley and Armstrong said in answer to questions upon their *voir dire* that they understood reading,

---

---

Jefferson County v. B. C. Lewis & Sons—Argument of Counsel.

---

---

writing and arithmetic, and it is not doubted that they did. We claim that this was sufficient under the statute to qualify them. It is a curious fact that a jury thus rigidly selected failed to bring in a correct result, and that a *remittitur* had to be entered by the plaintiff below. 9th Session Acts, 1877, chap. 3010, §7.

*7 and 8. As to the Effect of the Interest of Jurors who own Bonds of the same Issues as those Sued upon, one of them being interested in a suit actually pending in the same Court in which the same Issues must naturally arise.* These interested parties were declared to be competent jurors, and plaintiff in appeal was only able to keep them off the panel by exercising the right of peremptory challenge. And the right was exhausted when Mr. Bailey was excluded and the sixth juror was accepted by plaintiff in appeal under compulsion. *Plummer vs. The People*, 74 Ill., 361; *Davis vs. Allen*, 11 Pick., 466; *Jeffries vs. Randall*, 14 Mass., 205.

*9. As to the Admission of the Bonds in Evidence.* No sufficient basis had been laid for their introduction. They came in virtually under the ruling of the court referred to in 3 and 4. The plaintiffs below, as if in doubt about this ruling, produced some show of authority for the issue of bonds by the county and identified the handwriting of the signers of the bonds, but was this enough? They read an extract from the minutes of the Board of County Commissioners of Jefferson county which indicates that these bonds are claimed to be authorized by the I. I. Act, and we will examine them with reference thereto. 7th Session Acts, 1855, chap. 610, McClellan, 588.

Section 22 of the original act indicates the conditions which must exist and the several steps requisite to be taken before a county could issue bonds under this act. They are as follows:

(I.) A county was only authorized to issue bonds in aid

---

---

Jefferson County v. B. C. Lewis & Sons—Argument of Counsel.

---

---

of an improvement designated in section 4 of said act as a part of I. I. plan, as there marked out.

(II.) The company seeking such aid must have complied with the essential requirements of the I. I. Act.

(III.) With a view to aid such a company, and none other, the County Commissioners had the right to submit to a vote of the legal voters of their county to be held and taken at such times and places, and in such a manner as they should appoint, whether or not stock should be subscribed and taken by the county in such company.

(IV.) If when the vote had been thus taken it should appear that a majority of the votes was in favor of such subscription the County Commissioners were authorized to take stock in such company to an amount not to exceed half the cost of constructing the road through the county.

(V.) The Commissioners had authority to pay for such stock by the sale of county bonds.

(VI.) They had power to make the bonds payable at such times and places as they might deem proper and with interest at a rate not to exceed 10 per cent. per annum. The evidence submitted by the plaintiff below will be searched in vain to find such a basis as the above for the issue of the bonds in suit. There are no recitals in the bonds that such a basis for their issue existed. In addition to this the bonds produced are manifestly not such bonds as the declaration sets forth. We urge that they were improperly admitted in evidence. It may be argued that some of the deficiencies of the case of defendant in appeal were afterwards supplied by the plaintiff in appeal. But as the plaintiff in appeal only put in its evidence under the rulings of the court which it had excepted to on every appropriate occasion, it ought not to be prejudiced by this action. The legal effect and importance of the above recited steps will be sufficiently discussed elsewhere

---

---

Jefferson County v. B. C. Lewis & Sons—Argument of Counsel.

---

---

in the brief and we will not here refer to any authorities bearing upon that branch of the subject.

10. *As to excluding the results of another election held near the same time as that attempted to be held upon the bond question*, the statute required that it shall be first submitted to the vote of the legal voters of said county, city or town, to be held and taken at such times and places and in such a manner as such authorities (*i. e.*, in a county, the Board of County Commissioners,) respectively may appoint, whether or not stock shall be subscribed and taken. The County Commissioners never appointed a time or place for holding such an election, they never authorized the submission of the question to the legal voters of Jefferson county, they never set the machinery of the law in operation. But the Judge of Probate attached to the notice of a special election, held to choose Justices of the Peace and to fill some vacancies, one in the Board of County Commissioners, another in the delegation to the Assembly, an order to submit to the voters the question to authorize or not to authorize the Board of County Commissioners to issue bonds for one-half of the construction of the proposed railroad through said county, supposed to be about twenty miles, agreeable to an act of the General Assembly. Only 316 persons participated in this little election and we think it was pertinent to show, as we offered to do, that at the nearest election 530 voters participated.

11 and 16. *Relating to the general law of the case*. These errors will all be considered under a general discussion of the case as presented by the entire record, and our effort will be to show that the charge of the court to the jury, the verdict of the jury and the judgment rendered, were erroneous and that the merits of the case are with the plaintiff in appeal.

The defence to the bonds rested upon pleas one and two,

---

*Jefferson County v. B. C. Lewis & Sons—Argument of Counsel.*

---

setting forth substantially that Jefferson county did not make the bonds, nor seal them, nor acknowledge an indebtedness to bearer, and that the plaintiffs below were not damaged as alleged; further, that the bonds were not issued under legislative authority, did not bind the county and that plaintiff below took them with notice of such defects. *Mercer County vs. Hacket*, 1 Wall., 38; *Knox County vs. Aspinwall*, 21 How., 545.

We recognize the doctrine as laid down by the Supreme Court of the United States in numerous decisions, that where the Legislature has authorized a county to issue bonds for a public purpose within the scope of its constitutional authority, and the county has substantially executed the power through its proper authorities, although there may have been irregularities, in the execution, the bonds so issued are valid. And, if upon their face they import a full compliance with such a law the purchaser is not bound to look further, and if an officer is clothed with authority to certify a particular fact or decide a particular question his decision or certificate is final in the absence of fraud. *Lynde vs. The County*, 16 Wall., 6, 13.

We admit, too, that the statute giving certain public officers power to subscribe stock in the railroads, accepting and complying with the terms of the I. I. Act, was and is a constitutional statute; this court has so decided. *Cotten vs. Leon County*, 6 Fla., 610.

But there is nothing in the record of this case to show that the Pen. & Ga. Railroad ever accepted the provisions of the I. I. Act; nothing to show that the County Commissioners of Jefferson county ever sought to ascertain the will of the people of Jefferson county as to subscribing to the stock of that company. The evidence gives us all that was done. The only preliminary action taken was without their authority, and by a judicial officer who could not dis-

---

---

Jefferson County v. B. C. Lewis & Sons—Argument of Counsel.

---

---

charge any function pertaining to another department of the State Government. Const., 1845, Art. 1, §2; Ibid, §9; Session Acts, 1845, chap. 6, page 14; Hunt vs. Finegan, 11 Fla., 105; Adjourned Session Acts 1845, chapter 38, p. 84. The County Commissioners themselves were powerless to aid any road not embraced in the terms of the act. That officer ordered an election to determine whether or not to authorize the issue of bonds by the County Commissioners for one-half of the construction of "the proposed railroad." The people, according to the returns, voted on a different question—whether or not to authorize the County Commissioners to take stock in the contemplated railroad. The County Commisisoners entered upon their minutes, and it is the first entry upon the subject, that the question was submitted, whether the county should subscribe for stock in the P. & G. R. R., and they nowhere state in their minutes, or in the bonds, that this was done at such times and places and in such a manner as they had appointed.

Time and place are of the very essence of an election and the evidence offered and rejected establishes beyond a doubt that but a small portion of the voters turned out at the bidding of the Judge of Probate. The requirements of the law must be complied with. The officers designated must do the work. While a mere defect in a notice would be disregarded as an irregularity, the failure to fix the time, place and manner of getting at the will of the people is a fundamental defect which all takers and holders of the bonds must take notice of and be bound by. So. Ottawa vs. Perkins, 94 U. S., 260; East Oakland vs. Skinner, 94 U. S., 255; Buhanan vs. Litchfield, 102 U. S., 278; Marsh vs. Fulton Co., 10 Wall., 67; Jarrolt vs. Moberly, 103 U. S., 580; Bates Co. vs. Winters, 97 U. S., 83; Harshman vs. Bates Co., 92 U. S., 569; Dixon Co. vs.



---

---

Jefferson County v. B. C. Lewis & Sons—Argument of Counsel.

---

---

Field, 111 U. S., 83, 93; Cooley's Const. Lim., 602, 616; Barry vs. Lanch, 5 Col., 588; Secord vs. Foutch, 44 Mich, 89; State vs. Young, 4 Iowa, 561; I. N. and S. R. R. vs. Virden, 104 Ill., 339; Lanier vs. Padgett, 18 Fla., 842; State vs. Padgett, 19 Fla., 518; Carroll Co. vs. Smith, 111 U. S., 556, 561; School Dist. vs. Stone, 106 U. S., 183.

There is no recital in these bonds to estop anyone.

There is no allegation or proof that the bonds were sold as required by law; they were turned over, it appears, to the P. & G. R. R. Co., and by its officers sold at a discount. This was not in accordance with law. But even if the county had received money or other valuable consideration for them, that fact alone would not make the bonds good. Scipio vs. Wright, 101 U. S., 665.

Nor would the payment of interest by the county work an estoppel. The vote of the people, unless taken in accordance with legislative authority, cannot bind the county. The charge of the court shut off our defense upon this point. Loan Association vs. Topeka, 20 Wall., 655; Lewis vs. Shreveport, 108 U. S., 282; Allen vs. Louisiana, 103 U. S., 80; Bissell vs. Spring Valley Township, 110 U. S., 162, 169; Anthony vs. Jasper Co., 101 U. S., 693; Hoff vs. Jasper Co., 110 U. S., 53; McClure vs. Township of Oxford, 94 U. S., 429; Northern R. R. vs. Porter Township, 110 U. S., 608.

*17. The remaining error relates to the question of interest.* The bonds were issued at a time when the law fixed the rate of interest at six per cent. in the absence of a special contract. There was a special contract to pay eight per cent. only up to the maturity of the bonds, and after their maturity, we think it settled by the better class of authorities, that if the statute had remained unchanged, only six per cent. could have been claimed, if indeed, in such a case as this any interest could be collected. But a statute could

---

---

Jefferson County v. B. C. Lewis & Sons—Argument of Counsel.

---

---

not change the right of parties; the Legislature is powerless to vary a contract. This court has already decided that an act of the Legislature cannot reduce interest on existing contracts; then it cannot increase it. *Thomp. Dig.*, 234; *Fla. Stat.*, chap. 1483; chap. 1562; *Bernhisel vs. Firman*, 22 Wall., 160; *Cromwell vs. Sac. Co.*, 96 U. S., 61; *Myrick vs. Battle*, 5 Fla., 345.

If our view on this point is sustained by the court, and the court declares the bonds valid, then the plaintiff in appeal is entitled to a credit for the amounts paid each year in excess of the legal interest, equal to two per cent. of the face value of each bond.

*John W. Malone and John A. Henderson for Appellees.*

As to 1 and 2 grounds of error assigned. The declaration was not defective. The authority to issue the bonds sued on is recited on face of bonds, "subscription to Pensacola and Georgia Railroad Co. by vote of the county," "convertible into stock of the company," and "issued in pursuance of an order of the Board of County Commissioners, passed, &c." The order recited the title of the act of the Legislature of Florida, (sec. 22, *et seq.*, chap. 610,) authorizing the issue of the bonds for the construction of the said railroad, by the vote of the county, convertible into the stock of the company. It was not necessary to aver in the declaration the authority or power of the County Commissioners to issue the bonds. *Myer's Fed. Dec.*, title *Bonds*, sec. 1781; *Lincoln vs. Iron Works Co.*, 103 U. S., 412; 104 U. S., 586; *Clements' Corp, Sec.*, p. 82; *Smith vs. Tallapoosa Co.*, 2 Woods, (U. S. C. C.) 574; *My. Fed. Dec. Bonds*, sec. 1779.

As to the 3 and 4 grounds of error assigned. The court did not strike out the pleas of defendant, and the plaintiffs

---

---

Jefferson County v. B. C. Lewis & Sons—Argument of Counsel.

---

---

proved the execution of the bonds sued on before placing them before the jury.

As to the 5 and 6 grounds of error assigned. By sec. 7, chap. 3010, the Judge presiding at the trial was authorized to determine whether the jurors referred to had such knowledge of reading, writing and arithmetic, or either, as was necessary to enable the jurors to understand the evidence offered on the trial. McClellan's Dig., page 446, sec. 9. This was a discretion which the Judge properly exercised, and is not reviewable by the appellate court.

As to 7 and 8 grounds of error assigned. It nowhere appears that the appellant was prejudiced by the rulings of the court as to the competency, as jurors, of John Finlayson or E. B. Bailey, as neither were taken on the jury; but a jury was empanelled of qualified jurors, accepted by both parties. 2 Gra. & Wat. on New Trials, 192, 193, 286-7.

As to 9th ground of error assigned. Upon proving the execution of the bonds, and the payment of interest for twenty-three years by the defendant on the bonds, the plaintiff was entitled to have them considered in evidence before the jury. Co. of Clay vs. Soc. for Savings, 104 U. S., 579; M. Fed. Dec., Bonds, Sec. 1023; Supervisors vs. Schenck, 5 Wall., 772; Myer's Fed. Dec., Bonds, 1053 1054, 1463.

As to the 10th ground of error assigned. The proffered paper writings were wholly irrelevant. Myer's Fed. Dec., Bonds. sec. 1064, 902; Co. of Cass vs. Johnston, 95 U. S., 360.

As to 11th ground of error assigned. The court's charge embraced proper instructions on all the issues; the instructions asked for by the defendant and refused by the court were abstract propositions of law not pertinent to the issues, and irrelevant to the case and were properly refused. Hil-

---

---

Jefferson County v. B. C. Lewis & Sons—Argument of Counsel.

---

---

liard on New Trials, pp. 211, 265, §10; Ib., pp. 240, 305, §58; Gra. & Wat. on New Trials, 791.

As to the 12th ground of error assigned. The motion for a new trial was properly refused, because the verdict was in accordance with the law and the evidence. Any other verdict would have been in violation of law and without any evidence in support of it. The several grounds upon which the new trial was asked are the same as are here assigned for error and have been considered.

As to the 14th and 15th grounds of error. They are not well taken. They beg the question.

The 16th assignment is like the 14th and 15th, *ante*.

As to the 17th ground, the rate of interest as regulated by the contract for 8 per cent., and by the provisions of the statute under which the bonds were issued, before cited, which is still in force, and is not affected by any repeal or amendment. But if such were not the case we contend that the preponderance of authority, so great as to justify the assertion that it is the settled rule of law, is, that contracts drawing a specified rate of interest before maturity draw the same rate of interest afterwards. Myer's Fed. Dec., Bonds, sec, 1470; 17 Cen. Law Journal, 124, *et seq*.

We insist that the issue of the bonds was in all respects regular, and the county of Jefferson is bound in law for their payment. But if there had been irregularities in the issue, as contended for by the counsel and the agent of the Board of Commissioners, such irregularities are waived by the acquiescence of the county in the issue, and are cured by the payment of interest on the bonds regularly for twenty-three years; and by the act of the Legislature, (chaps. 927, 3474) directly or by implication, declaring the bonds to be valid. Either of which is sufficient to make them binding. Myer's Fed. Dec., secs. 1023, 1193, 1215,

---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

1667, 1683, 1686, 1227, 1660, 1661, 1673, 1679, 1681, 1698, 1671.

THE CHIEF-JUSTICE delivered the opinion of the court.

The *first* and *second* assignments of error relate to the overruling of the demurrer to the declaration. The declaration alleges that the county of Jefferson issued its bond, and then and there acknowledged itself indebted to bearer in a sum of money payable at a day certain with interest at eight *per cent.* per annum, and at the day payment was refused, plaintiffs being the bearer and entitled thereto. Copies of bonds are annexed to the declaration. On their face is written and printed: "Issued in pursuance of an order of the Board of County Commissioners on the — day of —, A. D. 1857." "Subscription to Pens. & Geo. R. R. Co. by a vote of county." "Convertible into stock of the company." They are signed, "Thos. J. Chase, Judge of Probate and *ex-officio* President of the Board of County Commissioners. Attest: Sam. Puleston, County Treasurer." Sealed with the seal of the Judge of Probate.

Defendant demurred on the grounds, (1) that it does not appear that defendant had any power or authority to make and execute the alleged bonds. (2) That the county could not make such bonds unless under and by virtue of some legislative enactment, and plaintiff does not aver that the alleged bonds were so executed. The demurrer was overruled.

It is an admitted and undisputed doctrine that the power of public and municipal corporations to subscribe to the stock of railway companies and issue bonds therefor must be expressly conferred. And hence as a matter of pleading the authority or power to issue the bonds in suit ought to appear on the face of the declaration, or by some recital in the bonds made part thereof; that is, it should thus appear

---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

that they were issued for some purpose authorized by statute. 1 Dillon's Mun. Corp., §509.

In Thayer vs. Montgomery Co., 3 Dillon, C. C., 389, which was a suit on county bonds, defendant demurred to the declaration on the ground that the authority or power of the county to issue the bonds is not averred and does not appear on the face of the bonds. Miller, J., says: "The third ground of demurrer presents to my mind a more serious question. It is, that an authorized lawful purpose for which the bonds were issued should be alleged in the declaration or be recited in the bonds which are made part thereof. This I think is a sound proposition."

In the same volume in Kennard vs. Cass Co., p. 149, Dillon and Krekel, J. J., it is said: "But where the maker is a county or other corporative body which has no inherent or general power to make such instruments, and can make them only by virtue of special authority, the principles of pleading require that such authority should appear by distinct averment of the special act conferring it, or by recital of the bond in that respect." And see Smith vs. Tallapoosa County, 2 Woods, 574.

In order to recover on the bonds of a county it should appear by special averment in the declaration (unless the same appears on the face of the annexed bond) that the authority for issuing is an act of the Legislature, citing the act, and that all the essential conditions had been complied with, the power depending upon such conditions, and where compliance with these conditions does not appear on the face of the bonds it must be otherwise proved.

The bonds in question are supposed to have been issued in pursuance of the provisions of the Internal Improvement Act of 1855. That act is not referred to in the declaration, nor is it averred that the Pens. & Geo. Railroad, referred to on the face of the bonds, is a road embraced in the pro-

---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

visions of the act or that this railroad company had accepted the provisions of the act, nor that said railroad or its extensions were contemplated to pass through or to terminate in or near the county of Jefferson; nor that the county subscribed for the stock after consent thereto duly obtained by submitting the question “whether or not stock should be subscribed and taken,” at an election duly held according to the provisions of the act, a majority of the legal voters having voted in favor thereof in pursuance whereof subscription to the stock of said company was made by the Board and the bonds in question duly issued and “disposed of for the payment of such subscription.”

These conditions were essential to create a liability on the part of the county, according to the requirements of the act, and should be averred in appropriate form. *Lincoln vs. Iron Works Co.*, 103 U. S., 412; *Clay Co. vs. Society, &c.*, 104 U. S., 579, 586; *Smith vs. Tallapoosa*, 2 Woods, C. C., 574, referred to by respondent, do not conflict with but support this doctrine. In all these cases the declaration or the bonds recite the source of the power to issue the bonds.

The result is that the demurrer should have been sustained and the plaintiffs allowed to amend their declaration.

The case having been tried upon the issues presented by the pleadings, and various questions arising thereon having been fully discussed upon this appeal, we proceed to examine these questions, as the case may be again tried after amendment of the pleadings.

The *third* and *fourth* errors assigned are in effect that in deciding upon the motion to strike out the defendant's pleas on the ground that they were not properly verified, the court in ruling that the verification was not sufficient to require plaintiffs to prove the execution of the bonds sued on.

There can be no error in this ruling because it was not

---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

pertinent to the decision of the motion, but was in the nature of an opinion of the court upon a question not yet reached in the cause, thrown out as a suggestion to the parties, and did not preclude the defendant from making any objection to evidence to be subsequently offered by the plaintiffs. The question did not arise upon the trial as there was evidence given by the plaintiffs at the trial showing the signing of the bonds by the persons whose names were appended thereto, and that they were the officers of the county as indicated upon the bonds.

The *fifth* and *sixth* grounds of error, are that the court upon the examination of the persons drawn as jurors, permitted the plaintiffs counsel to examine them "as to their ability to calculate interest, and to work interest in case of partial payments such as might arise upon the pleadings and proofs in this case."

The Statute of 1877, chapter 3010, section 7, provides that when the nature of any case requires that a knowledge of reading, writing or arithmetic is necessary to enable a juror to understand the evidence to be offered on the trial, it shall be a cause of challenge if he does not possess such qualification, to be determined by the judge. McC. Dig., 446, section 9.

Under this statute the qualifications of the juror in respect to the sufficiency of his knowledge and education, in other words, his practical education upon the questions likely to arise on the trial, are to be determined by the judge.

The object is to procure a jury sufficiently intelligent to understand the testimony and to render a proper verdict upon it. The ruling of the court here was within the scope of the statute and there is no error. It would be difficult to find error where the discretion of the judge is so broad in cases of this character.



---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

The *seventh* and *eighth* grounds of error are in deciding that Finlayson and Bailey were competent jurors, they having each stated on their *voir dire* that they owned bonds of Jefferson county similar to those involved in this suit, and of the same issue, and Bailey's bonds were in litigation in another suit in the same court. On challenge by defendant for cause the court overruled the challenge and decided that they were competent jurors, whereupon defendant challenged them peremptorily, and this exhausted defendant's right of peremptory challenge before the jury was completed.

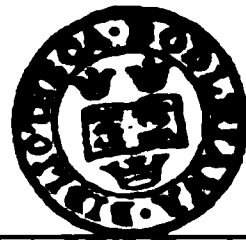
The statute law says the court shall examine on oath any person who is called as a juror, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice in a suit. Chapter 1628, sec. 24, Acts 1868. The court is to determine whether any of the grounds exist.

That the juror is interested in the pending of a similar suit, are grounds of challenge. *Fleming vs. State*, 11 Ind., 234; *Davis vs. Allen*, 11 Pick., 466; *Profatt on Jury Trial*, §168.

A principal challenge to the polls is founded on a *cause* of bias or partiality, which, if admitted or proved to the satisfaction of the court, will, as a matter of law, render the juror incompetent. *Profatt*, §167.

The fact that jurors are owners of similar bonds, that their validity is in question in this and in other suits pending, and that the decision or verdict in one is practically decisive of the other, is cause of bias and prejudice. The defendant's challenge of Finlayson and Bailey for cause should have been allowed.

The *ninth* assignment of error will be disposed of in subsequent portions of this opinion.



---

**Jefferson County v. B. C. Lewis & Sons—Opinion of Court.**

---

The *tenth* alleged error is in the exclusion of the returns of an election in Jefferson county, held in 1856, to show the number of voters in the county soon after the election held with reference to the issue of the bonds.

The number of votes cast on the subject of the issuing of bonds upon a subscription for railroad stock is not material to the validity of the bonds. It was only required by the Internal Improvement act, section 22, that a majority of the votes cast should be in favor of the measure. The returns of another election upon another question could not affect the validity of the election on the question of subscription for stock. The ruling was, therefore, correct.

On the motion for a new trial it was insisted the act of the Judge of Probate, as *ex-officio* President of the Board of Commissioners, was nugatory and in violation of the Constitution.

The following question is presented. Was it within the power of the Legislature in 1845, to impose upon the Judge of Probate the office and duties of President of the Board of County Commissioners?

The Constitution divided "the powers of government" into three departments, Legislative, Executive and Judicial, and declared that "no person, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances expressly provided in this Constitution." Const. of 1839, Art. 2; Thomp. Dig., 25.

The judicial power of this State shall be vested in a Supreme Court, Courts of Chancery, Circuit Courts and Justices of the Peace. Art. 5, sec. 1; Thomp. Dig., 49.

The General Assembly shall provide by law for the appointment in each county of an officer to take probate of wills, to grant letters testamentary, of administration and guardianship, &c. Art. 5, sec. 9; Thomp. Dig., 44.

---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

The General Assembly shall have power to establish in each county a Board of Commissioners, for the regulation of the county business. Art. 5, section 19; Thomp. Dig., 44.

By act of July 25, 1845, the General Assembly provided for the appointment of a Judge of Probate, and prescribed his duties. Thomp. Dig., 57. The Judge of Probate in each county shall be *ex-officio* a member and President of the Board of County Commissioners. Ibid, 58.

Under the foregoing provisions of the Constitution, in force from the organization of the State until long after the bonds in question were executed, the officer called a Judge of Probate, created by the Legislature, was not one of those in whom was vested "the judicial power of this State." The prohibition to exercise any duty not strictly pertaining to the judicial power, did not extend to the county officer thus created. The officer was called into existence and his duties prescribed, not only to take probate of wills, &c., but to record his proceedings, to have the custody of the records of the office, to certify copies thereof, to preside over the Board of County Commissioners, to keep the record of the proceedings of the board, &c.

These provisions of law were enforced and were assented to by all the departments of the government for more than twenty years, and the published proceedings of the county do not show that their validity has been ever before questioned. We, therefore, hold that the Legislature could and did rightfully confer upon the Judge of Probate the functions of a County Commissioner and the Presidency of the Board.

*As to the Issuing of the Bonds:*

The 22d section of the Internal Improvement Act of 1855 contains the law under which these bonds are supposed to have been issued, and provides that it shall be lawful for the

---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

Board of County Commissioners of any county through or near which such railroads or their extensions may pass, and they are authorized to subscribe and hold stock in said company upon the same terms and conditions and subject to the same restrictions as other stockholders: *Provided*, It shall be first submitted to the vote of the legal voters of said county, to be taken at such times and places and in such manner as said authorities respectively may appoint, whether or not stock shall be subscribed and taken; and if, when the vote be thus taken, it shall appear that a majority of the votes cast shall be in favor of such subscription it shall thereupon be lawful for the Board of County Commissioners, by agents by them appointed, to subscribe and take in such company such amount of stock as they may determine, the amount not to exceed fifty per cent. of the cost of construction through the county; and to issue bonds of the county, payable with interest at such times and places as they may deem proper, and to dispose of the same for the payment of such subscription.

The plaintiff offered in evidence the record of the proceedings of the County Commissioners of Jefferson county at their meeting held June 5, 1856, page 130, as follows: “Be it known that *after public notice, duly given, the question was submitted* to a vote of the legal voters of Jefferson county on the 7th of May last, whether this county should subscribe for stock in the Pensacola and Georgia Railroad Company, and it was decided in favor of such subscription by a majority of 278 votes out of 297, being all the votes polled.

“Now, therefore, the Board of County Commissioners of Jefferson county, by virtue of the said vote and of the power and authority on them conferred by an act to provide for and encourage a liberal system of internal improvement, approved 6th January, 1855, have determined to subscribe for twelve hundred and fifty shares, of one hundred dollars

---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

each, of the stock of said company, which sum, it is estimated, will not exceed one-half of the cost of construction of said railroad across Jefferson county.

“And further, the said County Commissioners do authorize and appoint Robert H. Gamble to be the agent to make the above subscription for and in behalf of Jefferson county.”

And thereupon the plaintiffs further offered in evidence from the same book the proceedings of said Board at their meeting held March 31, 1856, as found on page 1147 of said book, and the proceedings of said Board at their meeting held January 10, 1857, as found on page 153 of said book.

The said proceedings were then read from said book as follows, from page 147: “Whereas, the Board of Directors of the Pensacola and Georgia Railroad Company have called for an installment of ten per cent. on the subscription to the capital stock of said company; and whereas, this Board has subscribed to said railroad company for twelve hundred and fifty shares of said stock; it is, therefore, ordered, that Thomas J. Chase, Judge of Probate and *ex-officio* President of this Board, be and he is hereby required to issue bonds, with coupons of annual interest, of one hundred dollars each, drawing eight per cent. interest, payable annually from their date, pledging the faith and resources of this county for the payment of the same to the amount of twelve thousand five hundred dollars, being ten per cent. of said stock, said bonds to be attested by Samuel Puleston, Treasurer of this county; said bonds to be dated on the 10th day of April next, and made payable on the 10th day of April, 1861. And it is further ordered, that the President of this Board be and he is hereby required to pay said bonds over to the President of the Pensacola and Georgia Railroad Company, taking his receipt for the same; and that he, the President of this Board, be and he is hereby required

---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

to keep a register of all such bonds issued by the order of this Board.”

And from page 153 the said proceedings were further read as follows: “Whereas, the Board of Directors of the Pensacola and Georgia Railroad Company called an installment of ten per cent. on the capital stock of the company, payable on the first day of October, 1856, being the fourth installment called in, and another installment of twenty-five per cent., payable on the first day of December, 1856, being the fifth installment, amounting to thirty-five per cent.; and whereas, this Board has subscribed to said railroad company for twelve hundred and fifty shares of said stock; it is, therefore, ordered, that Thomas J. Chase, Judge of Probate and *ex-officio* President of this Board, be and he is hereby required to issue bonds and coupons amounting to forty-three thousand seven hundred dollars, said bonds to be attested by the Treasurer of the county, and made payable on the first day of January, 1877, drawing interest from the first day of January last at eight per centum per annum.”

In Com’rs of Knox Co. vs. Aspinwall, 21 How., 155, 158, we find the following language:

“The ground upon which the want of authority to execute the bonds in question is placed is the alleged omission to comply with the requisition of the statute of 1849 in respect to the notices to be given of the election to be held on the first Monday of March, at which a vote was to be taken pany.

“It is insisted that an irregularity or omission in those notices had the effect to deprive the Board of this authority or rather furnish evidence that the power had never vested in it under the act; and, further, that the plaintiffs are chargeable with the knowledge of all substantial defects

---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

or irregularities in these notices of the election, and not therefore entitled to the character of *bona fide* holders of the securities.

“The act in pursuance of which the bonds were issued is a public statute of a State, and it is undoubtedly true that any person dealing in them is chargeable with a knowledge of it; and as this Board was acting under delegated authority he must show that the authority has been properly conferred. The court must, therefore, look into the statute for the purpose of determining this question; and upon looking into it we see that full power is conferred upon the Board to subscribe for the stock and issue the bonds, when a majority of the voters of the county have determined in favor of the subscription, after due notice of the time and place of the election. The case assumes that the requisite notices were not given of the election, and hence that the vote has not been in conformity with the law.

“This view would seem to be decisive against the authority on the part of the Board to issue the bonds, were it not for a question that underlies it; and that is, who is to determine whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription? Is it to be determined by the court, in this collateral way, in every suit upon the bond, or coupon attached, or by the Board of Commissioners, as a duty imposed upon it before making the subscription?

“The court is of the opinion that the question belonged this Board. The act makes it the duty of the sheriff to give the notice of the election for the day mentioned, and then declares if a majority of the votes given shall be in favor of the subscription, the county board shall subscribe the stock. The right of the board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription;

---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

and to have acted without first ascertaining it would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. This board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests.

“We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached; but, after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way.”

“Another answer to this ground of defence is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of the subscription, by the board, to the stock of the railroad company, and the issuing of the bonds.”

Referring to the above case, the same court, in *St. Joseph Township vs. Rogers*, 16 Wall., 644, 665, says:

“Non-compliance with one of the conditions was clearly shown in that case, as the notices of the election as required by law had not been given in any form, but the decision was that the question as to the sufficiency of the notice and the ascertainment of the fact whether the majority of the votes had been cast in favor of the subscription was neces-



---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

sarily left to the inquiry and judgment of the county board, as no other tribunal was provided for the purpose, and the court held that after the authority had been executed, the bonds issued, and they had passed into the hands of innocent holders, it was too late, even in a direct proceeding, to call the power in question, and that it was beyond all doubt too late to call the power in question to the prejudice of a *bona fide* holder of the bonds in a collateral way, which is attempted to be done in the case before the court." See also on this subject *Lynde vs. The County*, 16 Wall., 613, where the court says: "The County Judge is the officer designated by the statute to decide whether the voters have given the required sanction. He executed and issued the bonds, and the requisite popular sanction is set forth on their face. It is a settled rule of law that where a particular functionary is clothed with the duty of deciding such a question, his decision, in the absence of fraud or collusion, is final. It is not open for examination, and neither party can go behind it."

And in *Supervisors vs. Schenck*, 5 Wall., 772, 784, it is said: "When a corporation has power, under any circumstances, to issue negotiable securities, the decision of this court is that the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." Similar language is used in *Gelpcke vs. Dubuque*, 1 Wall., 203; *Town of Caloma vs. Eaves*, 2 Otto, 484, 490.

The Board of County Commissioners was, by the 22d section of the Internal Improvement Act, before referred to, made the proper agent of the county to decide whether the necessary pre-requisites to the subscription for stock and the issue of the bonds had been complied with. Be-

---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

yond the reasonable presumption that the officers of the law have discharged their duty, we have the official record that the contingency has happened, on the occurrence of which the authority to subscribe for stock and issue bonds was complete. They have certified in their records that "after public notice duly given the question was submitted to a vote of the legal voters of Jefferson county, \* \* \* and it was decided in favor of such subscription by a majority of 278 votes out of 297, being all the votes polled."

It will be observed in the cases determined by the Supreme Court of the United States, the court especially entrusted under the Constitution with the function to determine questions as to the obligation of contracts, that recitals in municipal bonds are conclusive in favor of *bona fide* holders. With equal, if not with greater force, it may be said that innocent holders are protected where the municipal records themselves show that the preliminary conditions have happened, to wit: That the election was duly held, after public notice duly given and the question was submitted, and the result in favor of the action was decided, and so recorded, and in pursuance thereof the subscription was made and the bonds ordered to be issued. The board was the only tribunal appointed by law to determine the question, and upon the faith of their public record and action the bonds were issued and the board, representing the county, is now estopped to deny the truth of its own record as against *bona fide* holders of the bonds.

The defendant introduces certain papers on file in the clerk's office, showing that the name of the Judge of Probate was signed to the call for the election and the call does not say it is authorized by the Board. We see no objection to the election arising out of this fact. The Judge was the President of the Board, and the keeper of its records, its secretary also. Their record asserts that his action was au-

---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

thorized, was “duly” taken and that is sufficient. See Supervisors vs. Schenck, 5 Wall., 772.

*As to the question of interest:*

The board were authorized, by law, in case bonds were issued, to contract to pay interest at a rate not exceeding ten per cent. per annum. The bonds issued bore interest at eight per cent., and the principal became due in 1877. At the time they were issued the legal rate of interest for the loan of money was six per cent. Defendant now claims that after the bonds became due, if they were properly issued, they should bear the rate fixed by the statute in force when the contract was made, the special contract to pay eight per cent. extending only to the time of maturity.

There is much conflict in the decisions of the courts on this question. In many of the States it is held that the contract rate ceases at the time the principal is payable, the contract being, that interest at a certain rate is payable for the certain time only, after which the rate fixed by statute, in cases where no rate is specified in the contract, will be the rule. In other States it is the rule that the contract rate will control until payment or judgment. The preponderance of opinion is in favor of the doctrine that the stipulated rate attends the contract until it is satisfied or merged in judgment. *Cromwell vs. Co. of Sac*, 96 U. S., 51, 61.

When a tenant agrees to pay a stipulated rent for one year and holds over, the law will imply that he is to pay at the same rate during the entire term of occupancy. What is paid for the use of a house is called rent; what is paid for the use of money is called interest. I fail to see why the contract rate of interest should not control until the contract is extinguished; or why a man ought to be excused from paying what in his judgment the use of money is worth, as evidenced by his contract, merely because he has failed to pay the money when it was due. If that were the

---

---

Jefferson County v. B. C. Lewis & Sons—Opinion of Court.

---

---

rule he may find it to his advantage to violate his agreement to pay his debt when it becomes due. The better rule, most consonant with morality as well as law, is that the agreed rate of interest attends the contract until it is satisfied or extinguished.

*Seal.* Objection to the bonds was made upon the ground that they were sealed with the seal of the Judge of Probate. The county had no official seal. The Judge being the President of the Board, and being ordered to execute the bonds, it was not inappropriate that he used his official seal or any other device in the way of a seal that was most convenient.

We have considered, as we believe, questions which cover all the exceptions presented. As to the charge of the court and the instructions which were prayed it is unnecessary to consider them in detail. Our discussion of the several matters relating to the bonds and the evidence necessary to sustain them will indicate what instructions to the jury should be given.

As we have indicated, there are errors in the record for which we are obliged to reverse the judgment and remand the case for further proceedings according to law.

# INDEX

## TO THE TWENTIETH VOLUME OF FLORIDA REPORTS

---

**ABATEMENT.** See *Mandamus*, 2.

**ACCOUNTS AND ACCOUNTING.** See *Administrators and Executors*, 5, 6, 7, 9, 10, 11, 13, 14, 16, 18; *Books of Account*; *Master in Chancery*; *Partners and Partnership*, 2; *Practice (Equity)*, 1, 2, 3, 4, 5.

1. An exception to the effect that there is error in the balance found against the defendant, and on the final accounting, no items being mentioned, is frivolous. *Sanderson's Administrators vs. Sanderson*, 293.

**"ACCOUNT STATED."** See *Statute of Frauds*, 3.

**ADMISSIONS.** See *Trusts and Trustees*, 5.

**ADMINISTRATORS AND EXECUTORS.** See *Bills of Exchange*, 2; *Costs*; *Evidence and Witnesses*, 8, 10, 19, 20; *Fraudulent Conveyances*; *Parties*, 3; *Wills*, 1, 2, 3, 4.

1. An executor of an executor is the executor of the will of the first testator, unless he shall at the time of qualifying renounce and refuse to administer under the will of the first testator. *Hart's Executor vs. Smith*, 58.
2. After notice to the executor of an executor, of a petition praying the re-establishment of a lost writ of *fi. fa.* upon a judgment against the first executor, the last executor cannot have the petition dismissed on the ground that he has since the notice renounced administration under the will of the first testator. *Id.*
3. A decree under a creditor's bill directing the sale of the interest of certain heirs at law in real estate to satisfy a judgment against them, which real estate the heirs had conveyed for the purpose of hindering and delaying their creditor, does not interrupt the due administration of the estate by an administrator. *Gainer et al. vs. Russ*, 157.
4. Upon a bill by creditors against an executor, alleging deficiency personal assets and insolvency, and praying a discovery of all assets, their sale and the application of the proceeds to the debts,

## ADMINISTRATORS AND EXECUTORS—(Continued.)

It is erroneous to direct an execution to issue against the executor as for a *devastavit* to the extent of the estimated value of the assets in his hands subject to administration. To the extent that the assets consist of money in his hands, he should be directed to pay the same into the registry of the court; and if a sale of the real and personal property of the estate is necessary to the satisfaction of the debts proved before the master, it should be decreed. An execution against the executor should issue only for the sum with which he is chargeable on account of losses occasioned by negligence or failure in the discharge of his duty, or like causes. It should issue then only in the event that the money and the proceeds of the sales of the property are not sufficient to satisfy the claims of the creditors. Creditors have such equities whether the estate is solvent or insolvent. It is the ordinary bill by creditors for the marshaling and administration of assets of an estate. *Eppinger, Russell & Co. vs. Canepa*, 262.

5. An executor is entitled to credit for sums paid an attorney for legal advice when the charges are reasonable and proper in amount. *Id.*
6. The executor in possession of the real estate of the deceased, when the rents thereof are necessary to the satisfaction of the debts, is personally accountable to the creditors for the rental value thereof when the circumstances of the case disclose a failure to realise rents and neglect to exercise the diligence and business activity required at his hands in the management of the property. *Id.*
7. The executor collects money of the estate and permits it to remain in bank uninvested. It not being affirmatively shown that no good security could be found on which to put it out at interest, the executor failing to pay it into court, is chargeable with it under the statute as money retained on interest by him, and it should enter into his annual returns as money so retained, interest being added to the principal annually. *Id.*
8. Where the executor fails to file an inventory of the personal property of the estate, neglects to make his annual returns, and fails generally to discharge his duty, he not only forfeits his commissions but is also properly denied any compensation for general services. *Id.*
9. Where an administrator pays a tax to which the estate is subject, he is not to be charged as for *devastavit* on the ground that there may be some technical defect in the entry of the assessment or otherwise. Where there is an unauthorized investment of funds of the estate by the administrator, the equitable title of the dis-

## ADMINISTRATORS AND EXECUTORS—(Continued.)

tributee and the legal title of the administrator continues until the rejection of the investment by the distributee, and such investments are subject to taxation as the property of the estate until rejected. *Sanderson's Administrators vs. Sanderson*, 292.

10. Where the administrator was the partner of the deceased intestate and has in his possession, as such surviving partner, funds collected as attorney, which are claimed by others, but in which he thinks the intestate had rights, and he is in doubt as to the party entitled, and the party on whose account the collection was made will not instruct him how to apply the money, it is proper for him to file a bill of interpleader, and when he produces the money and pays it into the court under an order of court, subject to the litigation, he is not chargeable with the sum until it is received, or may be obtained by him from the court, in the event the estate is held entitled to it. *Id.*
11. The person subsequently appointed administrator of the deceased intestate finds a considerable cash deposit in a bank to the credit of the deceased. He makes a contract with the bank by which the estate was to receive interest thereon. He is properly chargeable with the sums, principal and interest, which he received under the contract. *Id.*
12. The amount fixed by the Chancellor for compensation to an administrator for his services after evidence and hearing will not be disturbed in a case where this court can see no error in the sum allowed. An additional *annual* allowance for services, however, cannot be made. *Id.*
13. That an administrator has made investments not authorized by the statute is no ground upon which to deny him compensation for his general services in a case where there is no loss to the estate by such investments and the administrator settles in accordance with the law controlling the matter of unauthorized investments. *Id.*
14. The forfeiture incident to a simple failure of an administrator to file his returns and have them allowed and approved as required by law extends only to his commission on amounts collected or disbursed. If the annual account of an administrator is placed in the hands of the Judge of the County Court at the time required by law, his failure to place a file mark on it does not result in a loss of commissions by the administrator. The Judge of the County Court should mark the account and vouchers filed, whether he approves them or not. If the return is not made as required by law, the administrator is entitled to no commissions. The first annual return of an administrator should embrace a

## ADMINISTRATORS AND EXECUTORS—(Continued.)

period of one year commencing from the date of his letters of administration. A return is not required to be filed by the first day of June, unless between that date and the letters of administration a year has elapsed. *Id.*

15. The exercise of discretion by the Chancellor in fixing the allowance by way of compensation and commissions to an administrator when within the limits fixed by law will not be disturbed by this court except where it clearly appears that the allowance is too much or not enough. *Id.*
16. Where the conclusion from the testimony is that an administrator could have readily collected a balance due the estate upon a judgment with the use of that reasonable diligence and care that a prudent man exercised in his own affairs, the administrator should be charged with it. *Shepard's Heirs vs. Shepard's Administrator*, 19 Fla., 300, cited and approved. *Id.*
17. The administrator set up as a ground of appeal, that he is charged "compound interest on money not actually reduced to possession," and fails to show any particular item or charge in which this has been done. It is not the duty of this court to look through several volumes of a record in search for illegal charges of any kind for either party, when they are not pointed out. Such grounds of appeal are to be regarded as "frivolous." *Id.*
18. Because there is no guardian of an infant appointed is no reason why funds in the hands of an administrator in which she has an interest is not to bear interest under the statute during the administration. *Id.*
19. A surety for a debt of a deceased intestate, the debt being due, has a provable claim against the estate. *Walker vs. Drew*, 908.
20. In the absence of a legal personal representative of a deceased intestate a creditor of such intestate has no equity to have a receiver appointed to collect the assets and administer the estate: this, in a suit by such creditor against an alleged wrongful executor, a creditor of the intestate, and a debtor to the intestate. *Id.*

ADVERSE POSSESSION. See *Statute of Limitations*, 2.

AMENDMENTS. See *Indictment*, 16, 17, 18; *Pleading (Law)*, 2, 3, 6.

APPEALS. See *Accounts and Accounting*, 1; *Administrators and Executors*, 12, 13, 17; *Attachment*, 2; *Decrees and Judgments*, 11, 12; *Landlord and Tenant*, 7, 8; *Pleading: Prohibition*, 1; *Remittitur Writ of Error*; *Bills of Exception*; *Books of Account*; *Exceptions*; *Circuit Courts and Judges*, 1.

1. An appeal does not lie from an order of the Circuit Court imposing



## APPEALS—(Continued.)

a fine for a contempt in violating an injunction; nor will a mandamus be granted to compel the approval of an appeal bond in such a case. *Caro vs. Maxwell*, 17.

2. The omission of a next friend to give a bond to secure the proceeds of a judgment to be recovered cannot be assigned as error by the defendant on appeal. He is not injured or prejudiced, and it does not concern him. *Neal vs. Spooner*, 38.
3. The appellant is responsible for the correctness of the record sent up to this court. When such record does not furnish the evidence or facts upon which alleged errors are based, this court will conclude that the rulings of the court below were in conformity to the law. *Horne vs. Carter's Administrators*, 45.
4. All the defendants to a judgment in ejectment must join in an appeal, or there must be notice and severance. *Knight et al. vs. Weiskopf et al.*, 140.
5. It is too late upon a second appeal, after hearing upon a former appeal and remanding the case, to object that an original protest of a note and certificate of a Notary are not evidence of the facts which they narrate, no such objection having been made and insisted upon at the time of their introduction in evidence. *Sanderson's Administrators vs. Sanderson*.
6. Upon a previous appeal in the judgment of this court there was assessed as costs the sum of \$20.75 for a "certified copy of the opinion of the Circuit Court." A sum paid by either of the parties for an additional copy of the opinion for their use, is not properly chargeable in the costs of the suit. *Id.*
7. Costs incurred in the Circuit Court after the entry of the appeal, such as a charge for certified copy of the record of the decree appealed from, are taxable in this court and not in the Circuit Court. *Id.*
8. The statute regulating appeals from orders and decrees of the County Court in Probate proceedings contemplates that the appeal shall be entered in writing by the party appealing. A mere verbal request made to the County Judge to enter an appeal in his minutes, furnishes no ground for a mandamus to compel the Judge to enter the appeal, if he neglects to comply with such request. *State ex rel. vs. Cooper*, 547.
9. The County Judge may, in a spirit of accommodation, enter an appeal in writing at the request of a party, but it is not a duty enjoined by law. A judicial officer ought not to be made responsible for the sufficiency of pleadings and proceedings of parties. *Id.*

## APPEALS—(Continued.)

10. A decree *pro confesso* must be reversed where the record discloses that it is based upon an order striking out a plea, which order does not appear to have been made after entry of the motion to strike on the chancery order book or after notice of any other character to the defendants. *Eldridge et ux. vs. Wightman & Christopher*, 687.
11. An appeal does not lie from an order, in a case at law, granting a continuance. Such order may be assigned for error upon an appeal from the final judgment. *Read vs. Gooding, Mull & Co.*, 773.
12. When in an action upon a contract the defendant pleads that he "did not promise as alleged," and also pleads specially that the plaintiff contracted with him as an agent of another and not otherwise, and that plaintiff knew this fact at the time of contracting, such special plea is only a repetition of the general plea that the defendant did not promise as alleged. *Walter vs. Florida Savings Bank*, 826.
13. The overruling of plaintiff's demurrer to such special pleas may, therefore, have been erroneous, but such ruling did not change the issues or affect the legal rights of the parties. Such pleas only encumbered the record. *Id.*
14. Where upon the trial of such cause a verdict is found for the defendant, but upon appeal the record does not show the testimony nor the rulings of the court thereon, nor the charge of the court to the jury, nor any exceptions, this court cannot reverse the judgment on account of the overruling of the demurrer to the pleas, as it does not appear whether the court admitted improper testimony in behalf of defendants, nor indeed that the plaintiff introduced any testimony in the case to support the declaration. *Id.*
15. A paper purporting to be a citation which is not properly tested and which is not served by an authorized officer, is not a legal notice of an appeal. *Joost vs. Elliott*, 924.
16. Writs issuing from this court or by the Clerk of the Circuit Court, which serve the purposes of writs of this court, should be tested in the name of the Chief-Justice of this court. There is no law authorizing any writ to be tested in the name of the Judge of the Circuit Court. *Tischler vs. Wall*, 924.
17. Though a Chancellor may have erred in allowing an original deed to be put in evidence without proving its execution, yet where the pleadings and other evidence are such that the introduction of the original was immaterial and unnecessary to a proper disposition of the case and did not affect the decree, the error will be disregarded. *Matthews vs. Lindsay*, 962.

**APPEALS—(Continued.)**

18. The finding of the fact of the delivery and acceptance of the deeds of partition in this case, being supported by a strong preponderance of testimony, must be affirmed. *Id.*

**APPELLATE PRACTICE.** See *Appeals*.

**ARREST OF JUDGMENT—**

1. A motion in arrest of judgment arises from *intrinsic* causes appearing upon the face of the record. It is not the proper remedy for a wrong verdict, nor is it the proper remedy for an illegal admission of evidence. It does not and cannot take place and answer the purposes of a motion for a new trial. *McClerkin vs. State*, 879.

**ASSIGNMENTS.** See *Lien*, 2.

**ATTACHMENT—**

1. An affidavit to obtain an attachment against a debtor's property that affiant is "informed and believes that the defendant is indebted," is not sufficient. The indebtedness should be directly stated, or the affiant should state such facts as would show the indebtedness. *Ross, Keen & Co. vs. Steen*, 443.
2. When a suit is commenced by summons and ancillary attachment is issued upon which property is seized, an order of the court dissolving the attachment is a final judgment from which an appeal lies, such judgment being a final determination of the ancillary proceedings. *Jeffreys vs. Coleman*, 536.
3. A bond given on suing out a writ of attachment by a copartnership firm, signed and sealed by one of them in the copartnership name, the signing having been authorized by the other by parol or ratified by parol, is a sufficient bond of both parties. *Id.*

**ATTORNEYS AND CLIENT.** See *Attorneys-at-Law*.

1. A promissory note, and mortgage to secure its payment, given by a client to his attorney to secure payment for professional services, will be sustained if the transaction is fair, honorable and proper. *Wharton vs. Hammond*, 934.

**ATTORNEYS AT LAW.** See *Attorney and Client*; *Administrators and Executors*, 5; *Costs*, 2; *Evidence and Witnesses*, 19, 20; *Partners and Partnership*, 1.

**AUCTION SALES.** See *Sheriff's Sale*, 1, 2.

**AUTRE FOIS ACQUIT OR CONVICT.** See *Criminal Law*, 23, 24, 25.

**BAILMENT.** See *Negligence*, 1, 2, 3, 4.

**BILL OF EXCEPTIONS.** See *Charge of Judge to Jury*, 4, 5; *New Trial*, 9.

1. All the evidence used in the proceedings in the court below, and upon the motions subsequent to the verdict, should be embodied in and made a part of a bill of exceptions in order to enable this court to review them. *Carter vs. State*, 754.
2. The laws of the State and the rules governing the Circuit Courts of the State provide the manner and time of making up and filing a bill of exceptions, so that it becomes a part of the record brought up by writ of error. *Smith vs. State*, 839.
3. Unless the law and the rules governing the court are complied with, the bill of exceptions is a nullity and cannot be considered in this court. *Id.*

**BILLS OF EXCHANGE.** See *Appeals*, 5.

1. Where the indorser of a promissory note resides in a different place from the point at which it is payable, notice of the default of the maker must be deposited in the post-office in time to be sent by the mail of the day succeeding the day of the dishonor of the note, provided the mail of that day be not closed at an unreasonably early hour, or before early and convenient business hours, in which case it must be sent by the next mail thereafter. Where the notice is not mailed until the second day after the dishonor of the note, and no circumstance which would extend the time is shown, it is not sufficient to bind the indorser. *Sanderson's Administrators vs. Sanderson*, 292.
2. If there has not been any due presentment and notice of dishonor of a note, and the indorser, after the maturity of the note supposing himself liable to pay it, takes security therefor from the maker, that will not alone amount to a waiver of the objection of the want of due presentment and due notice. The presumption there is that he takes the security merely as contingent security in case of his liability, but if the evidence is of such character as to show an admission of unconditional liability, and that evidence consists of such an admission to one who afterwards became the administrator of the indorser, and other circumstances, the amount of the claim so paid by the administrator should not be charged against him as a *derastavit*. *Id.*
3. Due notice of the non-payment of a common bank check may be necessary for the protection of the holder, but a protest by a notary is not so: such protest will not charge the drawer with the fees of the notary. *Wittich vs. National Bank*, 840.
4. W. drew his check on the M. bank where he had ample funds, in favor of the F. N. B., which being presented for payment at 11 o'clock was not paid, but M. bank informed payee it was good

BILLS OF EXCHANGE—(*Continued.*)

and would be paid at close of banking hours, which was the customary time for exchange of checks between them, whereupon payee at once caused the check to be protested by a Notary Public for non-payment. W. now sues payee for injury to his financial credit and reputation by unnecessarily causing the check to be protested. *Held*, on demurrer, that though protest was unnecessary, it was not a wrong to the drawer from which damage is presumed. *Id.*

BILL OF INTERPLEADER. See *Administrators and Executors*, 10.

BILL OF LADING. See *Mercantile Law*, 1. 2. 3.

## BILL OF PARTICULARS—

1. A bill of particulars attached to the declaration in an action of assumpsit, although sworn to, is in no sense evidence in the cause, nor in any event can it be referred to, to supply a deficiency in the proof on the part of the plaintiff. Its sole object is to inform the defendant of the nature and character of the cause of action, and for what particular items it is brought. *Belote vs. O'Brian's Administrator*, 128.

BONA FIDE PURCHASER. See *Deeds*, 3; *Municipal Corporations*, 11; *Sheriff's Sale*, 1.

BONDS. See *Appeals*, 1; *Attachment*, 3; *Municipal Corporations*, 5, 6, 7, 8, 9, 10, 11, 12, 13.

## BOOKS OF ACCOUNT—

1. Books of account, when offered in evidence, are in the first instance submitted to the inspection of the court, and if from such inspection they do not appear to have been honestly and fairly kept, they are to be excluded from the consideration of the jury. *Dunbar vs. Wright's Administrator*, 446.
2. If upon an inspection of a book of accounts brought up in the record, this court cannot see that the court below, in excluding such book, exceeded its authority or discretion, it will not reverse the judgment of such court. *Id.*

BOUNDARIES. See *Deeds*, 1.

1. Grants of land by a government *de facto* of parts of a disputed territory in its possession are valid against the State which may be ultimately found to have the right, and the rights of the inhabitants to property acquired in good faith from the *de facto* government, are respected. Re-affirming *Groover vs. Coffee*, 19 Fla., 61. *Coffee vs. Groover*, 64.
2. When a doubtful or disputed boundary is settled by agreement between States and duly ratified, such agreement does not operate retrospectively so as to disturb titles to property. *Id.*

**BOUNDARIES—(Continued.)**

3. A bill in equity filed to settle boundary lines between adjoining owners of land, no "confusion of boundaries" being involved, but only a dispute as to the location of the true boundary, it being a section line established by the United States surveys, presents only a naked question of title of which a court of chancery has no jurisdiction. The alleged fraudulent conduct of defendant in attempting to establish a line other than the true line which he has heretofore acknowledged, does not give equity jurisdiction. *Pendry vs. Wright*, 828.

**CHARGE OF THE JUDGE TO THE JURY. See Ejectment, 3.**

1. A charge to a jury, that "on the subject of malice or a premeditated design, I instruct you that when a killing is proved the law presumes that it was done from a premeditated design, unless it shall appear from the evidence, either on the part of the defence or the State that there was excuse or justification; and in the absence of explanation, the law implies malice, or a premeditated design from the use of a deadly weapon: *Held*, To be error. • *Ernest vs. State*, 383.
2. The statute requires that a Judge shall give or refuse to give to the jury such instructions as may be proposed by counsel, *as proposed*. An alteration of such instructions by the Judge, who then gives them to the jury as amended, is a refusal to give them as proposed and is error, if the instruction in either form is material, and the jury may be misled to the injury of the party excepting. If the instruction is not pertinent to the evidence there can be no error in refusing it. *P. & A. R. R. Co. vs. Atkinson*, 450.
3. An exception to the charge of the court to the jury that it is not in writing, must be taken at the time the charge is delivered. The parties may waive the formality of a written charge, and they cannot urge upon a motion for a new trial, or on an appeal in this court, for the first time, such omission. 17 Fla., 783. *West vs. Blackshear & Co.*, 457.
4. To enable this court to determine that there was error in the refusal of the court below to charge the jury upon the law, with reference to proof made on the trial, upon which refusal so to charge the alleged errors are based, such evidence should be brought here in the bill of exceptions in order to inform this court as to the applicability of the request to the facts proved. *Blige vs. State*, 742.
5. In no case, civil or criminal, will an appellate court indulge presumptions adverse to the correctness of the rulings of the court below. The presumptions which are indulged in are in support of the judgment of the court. *Id.*

CHARGE OF THE JUDGE TO THE JURY—(*Continued.*)

6. When either the State's Attorney or the attorney for a defendant, in cases provided for by Chapter 2006, Laws, desire the court to charge the jury in writing, a request to that effect must be made in writing before the evidence is closed. The party cannot subsequently except to the oral charge, unless he has complied with the law in that respect. *Id.*
7. The rule is well settled that an exception to the charge of the court to the jury must be taken to the identical portion or paragraph of such charge as is alleged to be error; and that an exception to the entire charge is not sufficient if a single proposition therein is good. 17 Fla., 643, and cases cited. *Carter vs. State*, 755.
8. Under Chapter 3431, Laws 1883, the party may, after verdict rendered, "embody in a motion for a new trial any portion of the charge of the Judge which may be deemed erroneous," but he must embody in such motion only such portion of the charge as is alleged to be erroneous. That statute does not change the rule. It only gives to the party an opportunity to except *after verdict rendered*. *Id.*
9. When the charge of the court to the jury is not embodied in the record so that this court may examine it, it will be presumed to have been correct, and that the law was properly given to the jury. *Boswell vs. State*, 869.

CIRCUIT COURTS AND JUDGES. See *Prohibition*, 2; *Venue*, 1.

1. The last clause of Section 7, of Chapter 3248, an act to provide summary proceedings against delinquent tenants, approved February 16, 1881, which provides that on an appeal from the judgment of the County Judge the Circuit Court shall try the case *de novo*, is inoperative. By the eleventh section of Article 6 of the Constitution the power of the Circuit Court in such cases is appellate only, and an appeal, in the absence of a statute regulating the proceeding, gives the Circuit Court only such power as it would have by a common law writ of error. The act in other respects appears to be valid. *King vs. State ex rel.*, 399.
2. Where a Circuit Judge, in pursuance of Section 7, Art. 6, of the Constitution, has been assigned to hold a term of court in a county in another Circuit, he becomes, *pro hac vice*, the Judge of the Circuit Court for that county during the continuance of that term; and during that time the power of the resident Judge is superseded as to all causes pending in the Circuit Court in that county. *Clark vs. Rugg*, 861.
3. After the jury retired to their room to consider of their verdict the Judge went home. Upon the return of the Judge the jury came into court to deliver their verdict. The Clerk was absent. The

CIRCUIT COURTS AND JUDGES—(*Continued.*)

jurors were called and answered to their names, were then asked by the Judge if they had agreed upon their verdict, and having answered that they had so agreed, delivered the same in writing to the Judge. The Judge received the verdict and handed it to the Sheriff, and then adjourned the court until the following day. Before the Judge left the court-room the Clerk came in, the Sheriff gave him the verdict of the jury and he recorded it in the minutes of the court: *Held*, not to be error; the Clerk is only the official scribe of the court. He is to keep regular and fair minutes of all the proceedings of the court. The duty of signing the minutes so kept by the Clerk is imposed upon the Judge, and his signature alone gives them verity. *McClerkin vs. State*, 879.

4. The Judge may keep his own minutes of the court by entering them himself, make his own adjournments, swear the witnesses, receive the verdict from the jury, and record or cause the same to be recorded in the minutes, which he subsequently verifies by his signature. *Id.*

CITATION. See *Appeals*, 15, 16.

CIVIL ENGINEER. See *Pleading (Law)*, 12.

CLERK OF CIRCUIT COURT. See *Circuit Courts and Judges*, 3, 4.

CONSIGNMENTS. See *Mercantile Laws*, 1, 2, 3.

CONSTITUTIONAL LAW. See *Circuit Courts and Judges*, 1, 2; *Em-*

*minent Domain; Homestead and Exemptions; Municipal Corporations*, 4, 10; *Prohibition*, 1.

1. In testing the question whether an act of the Legislature was passed in conformity to the requirements of the Constitution, the Journals of the Houses of the Legislature will be examined; and if the Journals furnish conclusive evidence that any bill was not passed in a constitutional manner it cannot be recognized as a law. *State ex rel. vs. Brown*, 407.
2. The Journals of the Senate and Assembly for the year 1883 do not show that Chapter 3416, an act regulating the issuing of licenses to sell liquors, wines and beer, was not passed in accordance with the requirements of the Constitution, and it is considered a valid act. *Id.*
3. The act of March 11, 1879, Chapter 3131, and the act of February 22, 1881, Chapter 3247, providing a summary proceeding by warrant of distress for securing the rents due to and the advances made by the landlord or at his request, by which the property liable to seizure is levied upon without personal notice to the tenant, is not in conflict with the constitutional provisions which



## CONSTITUTIONAL LAW—(Continued.)

secure the right of trial by jury, and declare that no person shall be deprived of property without due process of law. The acts provide that the tenant may have the matters in dispute tried by a jury on replevying the property and tendering an issue. *Blanchard and Burrus vs. Raines*, 467.

4. The forms of administering justice and the powers of the courts are subjects of legislative control. *Id.*
5. Where a proceeding is substantially a proceeding *in rem* a seizure of property in the possession of the owner for the enforcement of a lien upon it, is held to be sufficient notice to the owner, if no other notice is required by the statute. *Id.*
6. The provision of the Constitution that "the right of trial by jury shall remain inviolate" does not confer a right to a jury trial where the right did not before exist, but secures the right against abridgement in case where it existed prior to the adoption of the Constitution. There is no infringement so long as the right is not directly or indirectly denied. *Id.*
7. The title of a statute is "an act to amend section 23 of an act approved February 4, 1869, entitled an act to provide for the incorporation of cities and towns and establish a uniform system of municipal government in the State." The body of the act containing the amendment consists of three sections. The first section gives the city power to raise by tax and assessment money for general municipal purposes. The second section prescribes a method of valuation, limits the tax, and restricts appropriation. The third section legalizes assessments made before the passage of the act by the city according to the act then regulating assessments, and gives the power to enforce and collect the tax. The subject of the various sections of this act concerns the matter of taxation by cities for municipal purposes, and the general subject of the act as expressed in its title is the establishment of municipal governments. The act, therefore, is not in conflict with Section 14, Article IV of the Constitution. The act embraces but one subject and matter properly connected therewith, and that subject the title briefly expresses. *Gibson vs. The State*, 16 Fla., 291, cited and followed. *City of Jacksonville vs. Basnett*, 525.
8. An assessment of a tax is declared illegal by the courts for want of power in the municipal government to impose such a tax. The Legislature subsequently legalizes the assessment and confers the power to levy the tax. The power to collect and to levy is not retrospective, and to the extent that the legalizing the assessment is retroactive, it is within the power of the Legislature,

CONSTITUTIONAL LAW—(*Continued.*)

unless there is some other objection to it than that it is retroactive. If the assessment is such as the Legislature could have authorized at the time in the event, the city had then the power to levy it, it can legalize it for future action by the city under the newly granted power. *Id.*

9. The Legislature does not by such act directly levy the tax. The whole machinery for its assessment and collection is put in operation by the city except the original power to collect such tax, and this is simply an assessment and collection of a tax by the city, which tax is authorized by the Legislature: *Quere*, Whether the Legislature can directly assess, levy and collect a tax of this character. (Section 6, Article XII, of the Constitution construed so far as it relates to this legislation.) *Id.*
10. The 18th section of the Internal Improvement act of 1855, in exempting the employes of certain railroads from the duty of working on public roads, gave an immunity to such employes, but such immunity was not in the nature of an irrevocable contract with the roads or the laborers. The repeal of the immunity and imposing the duty was within the discretion of the Legislature. *Es parte Thompson*, 887.

CONTEMPT. See *Appeals*, 1.

CONTINUANCE. See *Appeals*, 11.

CONTRACTS. See *Damages*, 1, 2, 3, 4; *Mercantile Law*, 1, 2, 3, 4; *Negligence*, 1, 2, 3, 4; *Married Women*; *Parent and Child*; *Pleading (Law)*, 12; *Sheriff's Sale*, 1, 2, 3.

1. No obligation to pay the members of a volunteer association for the extinguishing of fires in a municipal corporation arises or is implied from the simple rendition of such service, and where they claim compensation the burden of proof is upon them to show a contract to that effect. *City of Jacksonville vs. Aetna S. F. E. Co.*, 100.
2. The evidence in the record of this case is substantially as follows: The record of the city covering the matter of the compensation of the Aetna Steam Fire Engine Company clearly discloses a state of facts and contract which admits a debt by the association to the corporation on the 10th of March, A. D. 1871, and provides for its satisfaction and payment by service to be rendered thereafter, upon terms to be thereafter agreed upon by the city and the company. *Id.*
3. A person who was Mayor of the city in 1869, 1870, 1871, 1875 and during other years to 1881, swears that according to his recollection the city assumed the outstanding debt of the company, and took a mortgage on the engine to secure its repayment; that he was

## CONTRACTS—(Continued.)

Mayor at the time the question of paying the companies came up; that he introduced an ordinance allowing compensation, and that to the best of his recollection it was not passed. No ordinance or contract allowing compensation is shown by the records of the city. *Id.*

4. A person who was Clerk of the City Council during the years 1873, 1874 and 1875 swears that during that time the city passed a resolution transferring the engine to the company, the amount due the company under a contract previously made with them and to his term of office to be allowed as payment for the engine, in whole or in part, so far as it would go. This resolution, he swears, was lost while he was Clerk and before he recorded it. The contract, he swears, provided in terms that the city should pay to each of the fire companies twenty-five dollars for each hour they worked at a fire in the city; that he only remembers having seen and read it over; that he does not recollect its date, and that it was lost while he was Clerk: *Held*, That the finding of a referee awarding damages at the rate of \$25 per hour for services rendered from February 12, 1871, to and including July, 1878, for the sum of \$6,900, giving a credit for the admitted debt of the company to the city of \$3,500 on the 12th of March, 1871, is clearly contrary to the evidence, and the only consistent construction of the testimony of the Clerk, with the records of the city and the acts of the parties, is that the contract, to the existence of which he swears, bore date before the 12th of February, A. D., 1871, and was thus controlled by the terms of the subsequent contract of that date, and that such finding of the referee, being clearly contrary to the testimony, should be set aside and a new trial awarded. *Id.*
5. The statute giving a lien and remedy to the landlord for rent and advances enters into and forms part of the agreement for leasing. *Blanchard and Burrus vs. Raines*, 467.
6. A note promising to pay a sum of money for rent of land to which is appended a stipulation that if this note and another for the same amount shall be promptly paid when due the payee shall make title to the land to the maker of the notes, otherwise the amount to be deemed as rent only is but a promise to pay rent, which may become purchase money upon full compliance by the lessee. *Id.*
7. A. contracts with B. to do certain work. One of the stipulations of the contract is that payments shall be made to B. when the work contracted for shall have been inspected and accepted, A. reserving ten per cent. from each payment until the whole work

## CONTRACTS—(Continued.)

shall have been inspected and accepted; A. to have power in case of B.'s failure to perform the work faithfully, to annul the contract. The reserved percentage in such event was to be forfeited. B. contracts with C. to do the work upon like terms as existed between himself and A. C. performs a part of the work but fails to complete it and abandons it. B. completes the work and collects the money due on the entire contract: *Held*, That C. is not entitled to the ten per cent. retained from the amounts due him for work done by him under his contract with B. *Lara, Ross & Co. vs. Greeley et al.*, 926.

CORPORATIONS. See *Decrees and Judgments*, 6; *Quo Warranto*.

1. The creditors of a dissolved insolvent corporation may seek a court of equity to subject its real property and effects to sale to satisfy its debts without proceeding at law to judgment, execution and return of *nulla bona*. In this case the time in which, by the statute, the existence of the corporation for the purpose of being sued was continued had expired. *Howe vs. Robinson*, 352.
2. The dissolution of a corporation does not extinguish its debts. The debts survive, and its creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of a *bona fide* purchaser. Such property is affected with a trust *primarily* for the benefit of creditors. *Id.*
3. *Scire facias quare executionem non* does not lie upon a judgment against a dissolved corporation after the expiration of the time in which its existence is continued for the purpose of being sued. *Id.*

COSTS. See *Appeals*, 6, 7; *Landlord and Tenant*, 9.

1. A demurrer interposed in the Circuit Court is overruled. There is no question of the equity of the bill. Upon appeal this court discovers that an infant plaintiff was not properly before the court; that the widow of the deceased intestate was suing in a right which did not exist, and had omitted to make certain allegations. Upon remanding the cause this court directed that an amendment be allowed. The defendant as to costs under these circumstances should stand in no better position than if he had set up the grounds in his demurrer, and the court should have sustained his demurrer. Costs of the amendment and no more should have been allowed. This was the extent of the additional cost incurred and no more under the usual practice was permissible. *Sanderson's Administrators vs. Sanderson*, 292.
2. Where the suit is by distributees for an account at the hands of the administrator, who is also a debtor to the estate as surviving partner in a partnership of which the deceased intestate was the

**COSTS—(Continued.)**

other member, and the distributees in said suit claim and recover a balance against him as surviving partner, neither the estate nor the interest of any distributee should be charged with any costs incurred in connection with the accounting as surviving partner, where the claim is resisted by the surviving partner after a failure by him to render an account of partnership transactions. Here the surviving partner has no claim to costs, either as between party and party or as between attorney and client. As to the matter of the suit for distribution notwithstanding the disallowance of some of the claims of the administrator, and notwithstanding the fact that upon an accounting he is found indebted to the distributees, he is entitled to his costs as between party and party, and also to any reasonable charge which he has incurred for attorney's fees, in the matter of his accounting and settlement as administrator in a case where he has acted in good faith without fraud, and his administration is followed by a full and fair settlement, and where from the position assumed by the distributees he was forced to submit to litigation in order to arrive at any fair settlement. *Id.*

3. An adult distributee is not responsible for all the costs incurred in a suit for the settlement of an estate in which a minor is a co-distributee. If not paid from the estate a portion of the costs would go against the next friend. Here a proportionate share should be charged against the part of the funds coming to the infant, as the suit is in good faith and for her interest by the next friend. *Id.*

**COUNTY BONDS.** See *Municipal Corporations*, 8, 9, 10, 11, 12, 13.

**COUNTY COMMISSIONERS.** See *Judge of Probate*; *Municipal Corporations*, 1, 2, 3, 4, 10, 11, 13; *Licenses*, 9, 10, 11.

**COUNTY COURTS AND COUNTY JUDGES.** See *Appeals*, 8, 9; *Judge of Probate*.

**COUNTY COURTS AND COUNTY JUDGES.** See *Appeals*, 8, 9; *Circuit Courts and Judges*, 1; *Judge of Probate*; *Writ of Error*, 2.

**COUNTY SEAL.** See *Municipal Corporations*, 13.

**COURTS.** See *the Several Courts and Clerk of the Circuit Court*.

**CREDITOR'S BILL.** See *Fraudulent Conveyances*, 1, 3; *Lien*, 4; *Administrators and Executors*, 4; *Corporations*, 1; *Practice (Equity)*, 14.

**CRIMINAL LAW.** See *Charge of Judge to Jury*, 1; *New Trial*, 1, 6, 7, 9; *Venue*, 1; *Writs of Error*, 1.

1. An indictment must be found within the time limited by statute, or the offence charged therein will be barred. *Anderson vs. State*, 381.

## CRIMINAL LAW—(Continued.)

2. An indictment was found at the spring term of the court, held in April, 1882, alleging that the defendant had committed an offence, not punishable with death, on or about the first day of March, 1880: *Held*, That the offence was barred by the statute: the judgment arrested and the defendant discharged. *Id.*
3. "Premeditation" is defined as meaning, intent before the act, but not necessarily existing any extended time before the act. "Pre-meditated design," as used in the statute relating to homicide, means an intent to kill, design means "intent," and both words imply premeditation. *Ernest vs. State*, 383.
4. The question of premeditation is a question of fact and not of law, and like all other facts, it must be determined by the jury. *Id.*
5. It is not in cases of a doubt, created by the evidence, in the minds of the jury, that they are to acquit a prisoner on trial, but it must be a reasonable doubt, one conformable to reason, a doubt which would satisfy a reasonable man. It is said to be, "that state of the case which, after the comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty of the truth of the charge." *Id.*
6. An indictment under sub-Chapter 4, Section 39 of Chapter 1637, Laws of 1868, charging that the defendant "feloniously did buy, receive and have, and did then and there aid in the concealment of certain stolen property of," &c., knowing the said property to have been feloniously stolen, &c., is good, the words "and have" being mere surplusage, and not liable to mislead the defendant. *Bradley vs. State*, 738.
7. When a statute makes either of two or more distinct acts, connected with the same general offence, and subject to the same punishment, indictable as distinct crimes, they may, when committed by the same person at the same time, be coupled in one count and constitute but one offence. *Id.*
8. The indictment in such a case might be either for the buying or the receiving, or the aiding in the concealment of the stolen property; but where it combines all these offences in one count, it is but one offence, and the punishment is no greater than when but a single charge, as of buying, is made and established. *Id.*
9. An application for the continuance of a cause is addressed to the sound discretion of the court, and ordinarily such discretion will not be interfered with by the appellate court. But where the court can see that the rights of the party may have been jeopardized, and the rule in regard to the application has been fully

## CRIMINAL LAW—(Continued.)

complied with, and there has been no previous delay, and especially when the application is made on the very day of the finding of the indictment, this court will control such discretion. *Blige vs. State*, 742.

10. On the trial of a prisoner for an assault with a deadly weapon with premeditated design to effect the death of the person assaulted, it is not sufficient for the court to charge the jury that "the assault must have been made with a dangerous or deadly weapon." The question of premeditation is also a fact for the jury to find, and they should be satisfied of such fact by the evidence, beyond a reasonable doubt. *Id.*
11. When either the State's Attorney or the attorney for a defendant, in cases provided for by Chapter 2096, Laws, desire the court to charge the jury in writing, a request to that effect must be made in writing before the evidence is closed. The party cannot subsequently except to the oral charge, unless he has complied with the law in that respect. *Id.*
12. A weapon may be a deadly weapon, although not especially designated for offensive or defensive purposes, or for the destruction of life or the infliction of injury. *Id.*
13. An indictment charging that the accused broke and entered with intent to commit a felony, "a certain building, to wit: the Main Exhibition Building of the Middle Florida Agricultural and Mechanical Fair Association," is fatally defective in not alleging that the building is the property of a corporation or persons. *Pell vs. State*, 774.
14. The rule is well settled, that the ownership of the building so burglariously entered must be alleged in the indictment. *Id.*
15. At common law, a boy under the age of fourteen years is presumed to be incapable of committing the crime of rape. *Williams vs. State*, 777.
16. A State Attorney has no authority to amend an indictment found by a grand jury, by his individual indorsement thereon. The only legal manner in which an amendment can be made is provided for in Chapter 1007, Laws 1860. *Dickson vs. State*, 800.
17. The allegation of the time or date of the commission of the offence is one of substance and not of form. A mistake in such allegations is not susceptible of amendment. *Id.*
18. The defendant was indicted in April, 1884; the offence was charged to have been committed in December, 1884; the State Attorney endorsed upon the indictment over his signature these words: "The date upon which the State relies is the tenth day

CRIMINAL LAW—(*Continued.*)

of December, A. D. 1883, and not the tenth day December, A. D. 1884." *Held*, That the amendment was void and did not change the allegation in the indictment in that respect. The time alleged is matter of substance, and it being an impossible day, the indictment was bad, and the judgment is arrested. *Id.*

19. It is necessary for an indictment to state the county within which the offence was committed, and the proof must affirmatively sustain such allegation. *Cook vs. State*, 802.
20. The venue is a necessary part of an indictment, and it must be proven as laid. *Robinson vs. State*, 804.
21. The time of the commission of the offence must be proven to show that the prosecution is not barred by the statute of limitations. *Id.*
22. In the trial of an indictment for larceny it is always necessary to prove the value of the property alleged to have been stolen, in order to determine the grade of the offence and the penalty to be imposed. *Whitehead vs. State*, 841.
23. The conviction of a defendant of assault and battery, upon a plea of guilty, in a court held by a Justice of the Peace, constitutes no bar to a subsequent indictment and prosecution for an assault with a deadly weapon with a premeditated design to effect death, or an aggravated assault, based on the same act. *Boswell vs. State*, 869.
24. A conviction or acquittal, in order to be a bar to another prosecution, must be for the same offence, or for an offence of a higher degree, and necessarily including the offence for which the accused stands indicted. *Id.*
25. A legal acquittal or conviction in any court of competent jurisdiction is sufficient in law to preclude any subsequent proceedings for the same offence in any other court. *Id.*
26. In order to convict a defendant of the crime of perjury, the offence must be proved by the oath of two witnesses, or by the oath of one witness and by other independent and corroborating circumstances which is deemed of equal weight with another witness. *McClerkin vs. State*, 879.

CROSS BILL. See *Mortgage*, 4.

DAMAGES. See *Bills of Exchange*, 4; *Equity and Equitable Jurisdiction*, 1; *Set-off*.

1. Where a party sells and delivers to another party at a port of entry in this State a quantity of timber on board a ship, and guarantees the same to be of "the season's manufacture, and of fair average quality, the measurement to overrun the specifications," the



**DAMAGES—(Continued.)**

measure of damages to be recovered in an action for a breach of the contract is controlled by the difference in the value of the timber in the market where the contract was made, and the timber delivered. *Merritt vs. Wittich*, 27.

2. The refusal of the court to receive evidence in such a case of the difference in such value in the market of Liverpool, where the contract does not provide for such an assessment of damage, and where there is no allegation in the declaration that the damage was there to be assessed, is not error. *Id.*
3. The contract or agreement of parties in Liverpool for the purchase and sale of such timber, to receive from their consignor, in Pensacola, a certain sum in full for damages on a breach of such contract to be completed in Liverpool, is not evidence of the value of the timber as guaranteed in Pensacola, and its market value in Pensacola. *Id.*
4. The general rule is, "That damages recoverable will be calculated at the market value of the goods at the time and place when and where they ought to have been delivered." "And evidence of the value of such goods in a foreign market cannot be received upon a question of damages, unless it is averred in the declaration that the goods were bought for that market." *Id.*

**DECLARATION.** See *Bill of Particulars*; *Municipal Corporations*, 8; *Pleading (Law)*, 2, 11, 12.

**DECREES AND JUDGMENTS.** See *Administrators and Executors*, 4; *Attachment*, 2; *Criminal Law*, 23, 24, 25; *Evidence and Witnesses*, 15, 16; *Ejectment*, 1, 6; *Fraudulent Conveyances*, 3; *Lien*, 5; *Parties*, 1; *Practice (Equity)*, 4, 5, 16, 17, 19, 20; *Prohibition*, 1; *Replevin*; *Sheriff's Sale*, 1.

1. A former adjudication of the cause of action is not proper ground of a motion to dismiss, but is a matter of defence. *Coffee vs. Groover*, 64.
2. A mere extract from a record of a judgment is not evidence to prove a judgment. The whole record or an authenticated or proved copy is necessary. *Walls vs. Endell et al.*, 86.
3. The expiration of the time during which an execution may be issued upon a judgment under the statute without proceeding by *scire facias quare executionem non* does not destroy the binding efficacy of the judgment upon the land of the debtor, and the judgment creditor can resort to proceedings other than that of *scire facias* when he can make them available to collect his debt. *Howe vs. Robinson*, 353.
4. *Scire facias quare executionem non* does not lie upon a judgment

DECREES AND JUDGMENTS—(*Continued.*)

**against a dissolved corporation after the expiration of the time in which its existence is continued for the purpose of being sued. *Id.***

5. Real property levied on under a junior judgment and sold, is still subject to the lien of an older judgment, and the circumstance of not proceeding upon the older judgment until a subsequent lien has been obtained and carried into execution will not displace the prior lien. The case of *Moseley vs. Edwards*, 2 Fla., 429, cited and followed. *Id.*
6. The statutory limitation to an action upon a judgment in this State is twenty years. Where the judgment is against a dissolved corporation, the time which has expired is fifteen years, and during the greater part of this time there was no corporation in existence from which payment of interest or principal of the judgment debt could have been demanded, or against which proceedings to revive the judgment for the purpose of obtaining an execution thereon could be had, and there is no circumstance from which payment could be inferred, a court of equity will not refuse to enforce the judgment on the ground of laches or presumed payment of the debt. *Buckmaster vs. Kelley*, 15 Fla., 195, cited and followed. *Id.*
7. An assignment by a debtor to a creditor of his interest in lands of his father's estate in which he has a fee in remainder, the assignment not being recorded, is not valid in law or in equity as against the lien of a subsequent judgment against the debtor in favor of a third party who had no notice of the assignment. *Eldridge Dunham & Co. vs. Post*, 579.
8. A judgment against a tenant in common or copartner is a lien upon the interest of the debtor in the land, and if upon a partition this interest is converted into money, the priority of the judgment lien is preserved as against the fund. *Id.*
9. The lien of a creditor under a creditor's bill has no preference over the lien of prior judgments against lands which were subject to levy under execution. The priority of lien of a judgment creditor by the filing of a creditor's bill exists as a reward of diligence in the discovery of and subjecting assets of the debtor which were not within the reach of execution at law; and is not allowed as against a prior judgment which was a lien at law upon property subjected and converted into money by a sale in partition proceedings. *Id.*
10. A decree *pro confesso* in default of pleading against a defendant who has been summoned by publication, must be signed by the Judge. If signed by Solicitors it is nugatory. [In this case there is an-

## DECREES AND JUDGMENTS—(Continued.)

other order signed by the Judge, which is substantially a decree *pro confesso*.] *Rushing vs. Thompson*, 583.

11. A final decree rendered against a party failing to plead or answer, without a decree *pro con.* having been entered, may be irregular but the final decree is not therefore void. If erroneous, it may be set aside on appeal, but no advantage can be taken of the error collaterally, as when the record is offered in evidence. *Id.*
12. After a decree *pro confesso* the complainant may proceed *ex parte*, and on his motion the cause may be referred to a referee for trial and final decree under the Constitution and the statute, and a decree rendered by a referee so appointed, when duly recorded, is effective as a decree rendered by the court. *Id.*

DECREES PRO CONFESSO. See *Decrees and Judgments*, 10, 11, 12; *Practice (Equity)*, 6, 7, 8, 9, 10, 11, 12, 16, 17.

DEEDS. See *Appeals*, 18; *Evidence and Witnesses*, 2, 3; *Married Women*, 2; *Taxes and Tax Titles*, 1, 2, 3, 7; *Vendor and Purchaser*.

1. Where the courses and distances in a deed do not cover the quantity of land called for and are therefore uncertain as boundaries, and there are other boundaries given in the deed by adjoining tracts which are ascertained and sufficiently established, the lines will be extended to them where such a course is consistent with the manifest intention of the parties. *Hogans vs. Carruth*, 19 Fla., 84, cited and followed. *Simmons et al. vs. Spratt*, 495.
2. If the intended grantee in a deed is not named he should be ascertained by description so as to be distinguished from all others. A deed which sets apart, distributes and conveys "a lot of land to the estate of Daniel W. Hart," Daniel W. Hart being dead, does not pass the legal title to his niece, his devisee under his will entitled to his estate, and a purchaser of the interest of the devisee of Daniel W. Hart in such lot acquires no legal title. *Id.*
3. A grantee in a quit claim deed, or deed of release, occupies the same position in respect to an unrecorded prior deed or mortgage as did his grantor. He is not a *bona fide* purchaser without notice within the meaning of the recording acts. *Snow and Long vs. Lake*, 656.
4. A mortgage, though unrecorded, is good as between the parties thereto; and an assignee or release by quit claim of the mortgagor's interest is not allowed to invoke the aid of the registry laws to avoid a prior mortgage. *Id.*

DEMURRER. See *Pleading (Equity)*, 1, 2; *Pleading (Law)*, 4, 8, 11, 14, 15.

DESCENTS. See *Ejectment*, 5; *Husband and Wife*; *Statute of Descents*.

**DISMISSAL OF ACTION.** See *Decrees and Judgments*, 1.

**DOWER.** See *Homestead and Exemptions*, 1, 2.

1. A report of commissioners allotting dower, which by mistake sets apart to one of the parties land not embraced in the bill, should be set aside and recommitted for correction and a proper allotment. *Brokaw vs. McDougall et als.*, 212.
2. Commissioners in partition report that they have allotted to the widow the house buildings and improvements with ten acres, and to the two children of decedent fifty or sixty acres each, without buildings, and that in their judgment the division is "equal, equitable and fair," but make no estimate of value or productiveness. On motion to set aside the report, affidavits of two citizens were filed in support of exceptions to the report, who agree that the value of the share allotted to the widow is six thousand dollars, and that of each child about six hundred dollars, and no other testimony as to value was before the court: *Held*, That *prima facie* such division is manifestly unjust to the children, and a decree setting aside the report will not be disturbed. *Id.*
3. When commissioners in partition take testimony for the purpose of ascertaining the value of property to be divided, they should return the same to the court so that the court may determine as to the correctness of their report. And when testimony is to be taken the parties should have notice so they may be present, by themselves or agents, it being a judicial investigation affecting their interests. *Id.*

**EJECTMENT.** See *Appeals*, 4; *Deeds*, 1, 2; *Evidence and Witnesses*, 3, 5; *Pleading (Law)*, 1, 3, 4, 8, 9, 10.

1. A judgment in ejectment in favor of the plaintiff should state the quantity of the estate recovered. This is required by the statute of 1881; and a judgment which does not show what estate is recovered and to be delivered must be set aside and a proper judgment entered by the court, conformable to the verdict. *Neal vs. Spooner*, 38.
2. A plaintiff in ejectment is bound by the allegations in his declaration, and can recover possession of no greater quantity of land than he claims. He may, under certain circumstances, recover a lesser estate, or quantity, but never a greater. *Horne vs. Carter's Administrators*, 45.
3. It is not error for the court to refuse to give an instruction to the jury, requested by defendant's attorney, as to the adverse possession claimed by the defendant, unless there is embodied in such

**EJECTMENT—(Continued.)**

request a submission to the jury as to the fact whether such adverse possession had continued for the statutory period of seven years. *Id.*

4. When a jury brought into a court a verdict in ejectment, in favor of the plaintiffs generally and for damages, and, before the verdict is entered in the record, the court instructed them to bring in a verdict in the form required by law, and directed that a proper form be prepared, which being done the jury retired and brought in their verdict in legal form, signed by their foreman, upon which judgment is entered, there is no error in the proceedings. A jury may vary or correct a verdict before they are discharged and before it is recorded; and a form of verdict prepared under the direction of the court, assented to by the jury, is sufficient. *Coffee vs. Groover*, 64.
5. A suit in ejectment is brought by seven plaintiffs, brothers and sisters, and one of them before trial dies unmarried and no executor or administrator is appointed, the remaining co-plaintiffs and her mother being her heirs at law inheriting equally her undivided one-seventh of the land. The mother inheriting one-seventh of the share of the deceased, to wit: one forty-ninth, and she not being a party plaintiff, the right of action for such mother's share does not survive to the six brothers and sisters; but the right of action for the entire residue of the land, to-wit: forty-eight forty-ninths, does survive to the remaining plaintiffs, under the laws of this State and the rules of the Circuit Court. *McClellan's Digest*, 829, Sec. 73; C. C. Rules, 87. *Id.*
6. A judgment in proceedings for forcible entry and detainer, is not evidence in ejectment, either in bar of a right of recovery of the premises, or of mesne profits. *Walls vs. Endell*, 86.
7. An adverse possession of land under claim of title of less than seven years does not bar the right of action of the true owner or his grantees. Where the defendant in ejectment is in actual possession the plaintiff cannot recover where he fails to show legal title in himself or that he was a prior actual occupant ousted by the defendant. *Simmons vs. Spratt*, 495.
8. In ejectment it is incumbent on the plaintiff claiming under deeds to show proper conveyance from a party having title or prior possession, in order to put a defendant in possession to proof of his right. *Dubois vs. Holmes*, 834.

**ELECTIONS.** See *Municipal Corporations*, 6. 11.

1. Registration of voters can only be made in the manner and at the time prescribed by the act of 1877, chapter 3021, to wit: between the first Monday of October and a period ten days before the holding of a general election in the same year, at which time the

**ELECTIONS—(Continued.)**

registration books are required to be closed. Registration at any other time or in any other manner is not a legal registration. *State ex rel. vs. Commissioners*, 859.

**ELECTORS.** See *Elections*.

**EMINENT DOMAIN—**

1. The State has the right to make a compulsory purchase of, or to condemn the property of the citizen for a public use or purpose, just compensation being made to the citizen for it. *Moody vs. R. R. Company*, 597.
2. Such right the State through the legislative department of the government may grant to an incorporated railway company having the usual franchises and duties attaching to such companies, to the extent that the property is necessary for the use of the corporation in accomplishing the purposes of its creation. The statute, however, must provide just compensation to the citizen for his property so authorized to be taken. *Id.*
3. Neither an award of damages, nor a judgment against a corporation for damages ascertained, or to be ascertained by commissioners, is a just compensation to the citizen for the appropriation of his property by the corporation to its use in the construction of its road. *Id.*
4. The designation of the corporation in whom such right to condemn for public use is to be vested, the method of condemnation and the fixing the nature and extent of the compensation to be made for the property, are powers vested exclusively in the legislative department of the government. *Id.*
5. In this case an entry for the purpose of continuing an unlawful appropriation or taking was enjoined. Subsequently the injunction was dissolved upon the corporation obtaining a bond approved by the Judge under which the value of the property to be taken was secured to be paid after appraisement to the landowner: *Held*, In the absence of legislation giving such right to the corporation, that the court had no power to authorize a compulsory purchase by it or to prescribe a method of condemnation, or fix a compensation, just or unjust; that these were legislative "functions," which no part of the judicial department of the government could exercise unless the power so to do was "expressly provided for by the Constitution." The last clause of section 8 of the Declaration of Rights, Article 3 of the Constitution, and so much of chapter 1987 of the Laws, as proposes to vest in railroad corporations the right to condemn property and to fix the compensation to be made, construed. *Id.*

## EMINENT DOMAIN—(Continued.)

6. A section or a part of a section of a statute providing a method by a corporation of exercising the right of compulsory purchase of land may be unconstitutional. If, however, there are sufficient independent provisions constitutional in their character to provide a complete method of proceeding, effect will be given to such last named portions of the act and the condemnation authorized. *State ex rel. vs. R. R. Co.*, 616.
7. Section 20 of Chapter 1987, being the general statute for the incorporation of railroads in this State, in so far as it authorizes a railroad company which has not acquired title to land upon which it has constructed its track to have an appraisal for the damages done to the owner thereof to remain in possession during the pendency of the proceedings, and to have a stay of all actions pending against the company on account thereof on such company paying into court a sufficient sum to pay the compensation therefor when finally ascertained, is constitutional. The rights of the several parties under this section, so far as it controls this case, determined. So also is there sufficient and adequate means to ascertain the value of the land constitutionally prescribed and fixed by the 14th section of the same act. *Id.*
8. The mode or method of exercising the right of eminent domain in the absence of any provision in the organic law regulating it is within the discretion of the Legislature. The limitation is that it shall be exercised for a public purpose, with just compensation; and vesting the power of ascertaining it in a court and appraisers, is constitutional. It is not necessary that the owner shall have the right under the act to institute the proceeding to condemn the property, or that his right of action should be increased. *Id.*
9. In cases of actions by land owners against railroad companies, the Legislature has the power to prescribe reasonable rules, staying such as seek to dispossess the company pending constitutional proceedings of condemnation by it. *Id.*
10. Prior occupation of the land without authority of law, even though it be a trespass, will not preclude the company from taking subsequent measures authorized by law to condemn the land for its use. *Id.*
11. This court will not issue a writ of prohibition to the Circuit Court when it is acting within its constitutional powers in the enforcement of the constitutional provisions of the act above named. *Id.*

EQUITABLE PLEAS. See *Pleading (Law.)*

EQUITY AND EQUITABLE JURISDICTION. See *Boundaries*, 3; *Corporations*, 1; *Injunction*, 9; *Partition*, 3; *Sheriff's Sales*, 3.

1. Where the claim is for damages resulting from false and fraudulent

## EQUITY AND EQUITABLE JURISDICTION—(Continued.)

representations made by the defendants to the plaintiffs, the remedy, if the plaintiffs have a case, is at law not in equity. *Montgomery vs. Knox.*, 372.

ESTATES OF DECEASED PERSONS. See *Executors and Administrators*.

ESTOPPEL, See *Ejectment*, 2; *Municipal Corporations*, 11.

EVIDENCE AND WITNESSES. See *Bill of Particulars*, 1; *Books of Account*; *Constitutional Law*, 1, 2; *Damages*, 2, 3, 4; *Ejectment*, 6; *Fraudulent Conveyances*, 2; *Journals of the Legislature*; *Pleading (Equity)*, 3; *Pleading (Law)*, 1, 3; *State of Frauds*, 3; *Trusts and Trustees*, 3, 5.

1. General statements of an insolvent debtor as to the amount of his indebtedness to one of two contending creditors, both the insolvent debtor and such one of the contending creditors failing to give any itemized account or clear exhibit of the alleged debt, cannot be regarded as conclusively establishing the debt in a case surrounded with other suspicious circumstances. *Richardson vs. Hutchinson*, 21.
2. The record of a deed is not proper evidence, if objected to, without proof of an original duly executed. The original is not *per se* evidence, but its execution must be proved by evidence other than the certificate of proof or acknowledgment for record. *Neal vs. Spooner*, 38.
3. When a deed does not locate the land described as being in a given county or State, oral testimony is competent to identify the premises as to location and boundaries. *Coffee vs. Groover*, 64.
4. A certified copy of a will as "a true copy from the records of this office," without any mention that the will had been duly proved or admitted to probate and containing no copy of the probate or record of the proper tribunal, is not legal evidence. *Id.*
5. Evidence to show that a deed absolute is in equity a mortgage may be given by parol under a plea on equitable grounds under the statute. *Walls vs. Endell et al.*, 86.
6. The effect of the exceptions to the general rule, as provided in Chapter 1983, Laws 1874, McC. Dig., 518, §24, is not to render a witness incompetent generally, but only incompetent to testify upon certain specified subjects, namely: "transactions and communications," had with the deceased in his life time. Any party may testify to any fact pertinent to the issue, if it does not come within the exceptions as provided in and by the statute. *Belote vs. O'Brian's Administrator*, 126.
7. Where a fact alleged in a petition or bill in equity is at issue and is



## EVIDENCE AND WITNESSES—(Continued.)

testified to by one witness only, and an equally credible witness positively denies the fact or transaction (he being a party to it), and there is no other evidence bearing upon the fact alleged, it is error to find that the fact is proved in favor of complainant. *Coker vs. Dawkins*, 141.

8. Where plaintiffs allege the existence of a partnership between themselves and a party deceased in a suit against the executor of the will of the deceased party such plaintiffs are incompetent witnesses under the statute to establish transactions or communications between them and the deceased party of which they claim a partnership resulted, no evidence of such partnership appearing upon the books of the firm. *Eppinger & Russell Co. vs. Canepa*, 262.
9. Where the conflict in the testimony is clear and the court cannot upon a review of the evidence say that the findings of a master and a referee are wrong, they must be sustained. In a case of simple conflict the court cannot direct the finding to be for one party rather than the other. *Id.*
10. An administrator, under the statute, is a competent witness to declarations and admissions of the deceased intestate as to claims against him. *Sanderson's Administrators vs. Sanderson*, 292.
11. Letters written by the Chief Engineer of a railroad company, not being of the *res gestae*, are not admissible in evidence in favor of the company. *P. & A. R. R. Co. vs. Atkinson*, 450.
12. Testimony as to what expenses were necessary to be incurred by an engineer upon one section of a road in its construction, is not competent to show what outlay was proper upon another section, there being no evidence that the conditions were the same in both sections. *Id.*
13. It is error to receive in evidence the statement of a party made in his own behalf to a third person, without in any way connecting the other party therewith, as it furnishes no legal proof of the facts claimed to exist, by reason of such evidence. Especially is it error when such evidence has a tendency to mislead the minds of the jury in coming to a correct conclusion. *Mills et ux. vs. Joiner*, 479.
14. It is a well established principle that hearsay evidence "is held incompetent to establish any specific fact, which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge." *Id.*
15. The general rule is that if a deed purport to have been executed under a power, either of a public or private character, or by the officer of a court under a decree, and it is sought to use the deed

## EVIDENCE AND WITNESSES—(Continued.)

- in evidence, the power should be shown, and in case of deed under a decree the party offering the deed should introduce a transcript of the record of the decree. *Simmons et al. vs. Spratt*, 495.
16. Where, however, such deeds purporting to be executed by executors under the powers of a will and orders of the probate court, and by a master in chancery under a decree in chancery are offered and placed in evidence without objection in the Circuit court, it is too late to object in the Appellate Court that neither the will, the order, nor the decree authorizing the sale or the disposition made by the deed was introduced. *Id.*
17. Independent of the statute (McC. Dig., 515) prescribing how official papers or certified copies thereof may be used in evidence, the rule is that every document of a public nature, which there would be an inconvenience in removing and which the party has a right to inspect, may be proved by a duly authenticated copy. The official character of the record, however, must be shown. Where a paper is proposed to be introduced as a copy of a public survey by a public officer authorized to make it, it is necessary to show something more than that such a survey, purporting to have been made by a person not shown or purporting to be a public officer, was simply copied from the original found in a public office. *Id.*
18. If the purpose of putting a question to a witness is not apparent with reference to the pleadings or to the testimony already given, it is not error to overrule the question, unless its object be stated so that its materiality may be made manifest. *McLean vs. Spratt*, 515.
19. The plaintiff in an action against an executor for professional services as an attorney and counsellor at law, rendered for the testator, after proving his book of accounts by his suppletory oath, offered to prove by his own oath that the services so charged were actually performed by him, and that the sums so charged were reasonable and just, but the court excluded such evidence: *Held*, That such exclusion of the testimony of the plaintiff as to those facts was error. *Deans vs. King's Executrix*, 533.
20. Such evidence, introduced on the part of the plaintiff by his own oath, is not in contravention of the law of February 14, 1874, which only prohibits testimony of "transaction, or communications," in such cases. *Id.*
21. Where the testimony of plaintiff is that the contract upon which he sues was made at a certain place, and in the presence of named disinterested parties, and these parties when examined deny any

**EVIDENCE AND WITNESSES—(Continued.)**

knowledge of such contract, plaintiff's testimony must be rejected in the determination of the cause. *Lara, Ross & Co. vs. Greeley et al.*, 926.

**EXCEPTIONS.** See *Accounts and Accounting*, 1; *Appeals*, 4, 14; *Bill of Exceptions*; *Charge of Judge to Jury*, 3, 4, 6, 7, 8.

**EXECUTIONS.** See *Administrators and Executors*, 4; *Decrees and Judgments*, 3, 4, 5, 6; *Re-establishment of Lost Papers*; *Sheriff Sale*, 1; *Tender*, 2.

**EXTRADITION.** See *Writ of Error*, 5, 6, 7.

1. The act of Congress, February 12, 1793, relating to the rendition of fugitives from justice, requires that a copy of an indictment or an affidavit made before a magistrate, charging the person demanded with having committed a crime in the State from which he fled shall be produced and authenticated by the Governor demanding the rendition. When an affidavit so procured does not appear to have been made before a magistrate the warrant of arrest should not be issued. *Ex parte Powell*, 806.
2. When the Governor issues a warrant for such arrest and recites that the demanding Executive produced and authenticated "a copy of affidavits charging" the commission of a crime, not showing that such affidavits were made before a magistrate or judicial officer, it cannot be presumed that the affidavits were made in the course of judicial proceedings for the prosecution of the person demanded, and upon its face the warrant of arrest fails to show that it was authorized by law. *Id.*
3. The Executive authority in such cases can be invoked and exercised only in aid of judicial proceedings, where persons are charged before magistrates in the course of prosecutions for crime. *Id.*
4. The only inquiry to be made (on *habeas corpus*) when a person has been arrested under a warrant for extradition is, whether the statutory prerequisites have been complied with. *Id.*

**FACTORS.** See *Damages*, 1, 2, 3, 4; *Mercantile Law*, 1, 2, 3.

**FIRE INSURANCE.** See *Insurance*, 3.

**FLORIDA.** See *Boundaries*, 1, 2.

**FORCIBLE ENTRY AND UNLAWFUL DETAINER.** See *Ejectment*, 6; *Landlord and Tenant*, 4, 6, 7, 8.

**FORFEITURES.** See *Contracts*, 7.

**FORMER ADJUDICATION.** See *Criminal Law*, 23, 24, 25; *Decrees and Judgments*, 1.

**FRAUD.** See *Fraudulent Conveyances*; *Homestead and Exemptions*, 9; *Injunction* 7; *Insurance*, 2; *Sheriff's Sale*, 2, 3.

## FRAUD—(Continued.)

1. The question of fraud is one of motive and intent to be inferred from all the facts and circumstances attending a transaction, and does not depend upon presumptions not legitimately drawn from the fact. *Ballard vs. Eckman & Vetsburg*, 661.
2. When a purchase of goods is made in good faith and for a valuable consideration, from the owner who is embarrassed and insolvent, no fraud is imputed to the purchaser. *Id.*

FRAUDULENT CONVEYANCES. See *Administrators and Executors*, 3; *Insurance*, 2.

1. Parties owing debts and threatened with suit, who are entitled as heirs at law to real estate of the value of \$1,500 from the estate of their father who died possessed also of personal property worth over \$1,000, before judgment recovered against them convey to a relative also an heir the real estate in consideration of her promise to pay the debts owing by their father amounting to about \$200; and one of the judgment debtors sues out letters of administration of the estate of the deceased and as such takes possession of the personal property: *Held*, Upon creditor's bill, that the conveyance of the real estate under the circumstances was fraudulent and void as against the judgment creditor. *Gainer et al. vs. Russ*, 157.
2. The mere denial in an answer of a fraudulent intent in conveying property beyond the reach of an execution against them, while admitting all the facts which in law and equity constitute a fraudulent conveyance, is not such a denial as must be overcome by the testimony of several witnesses or equivalent evidence. Such denial must relate to facts charged and not to the conclusions and arguments flowing from the facts. *Id.*
3. A decree under a creditor's bill directing the sale of the interest of certain heirs at law in real estate to satisfy a judgment against them, which real estate the heirs had conveyed for the purpose of hindering and delaying their creditor, does not interrupt the due administration of the estate by an administrator. *Id.*

GEORGIA. See *Boundaries*.

GRANTS. See *Boundaries*, 1, 2.

GUARANTY. See *Statute of Frauds*.

HABEAS CORPUS. See *Extradition*, 4; *Writ of Error*, 3, 4, 5, 6, 7.

HEIRS. See *Homestead and Exemptions*, 7; *Statute of Descents*.

HIGHWAYS. See *Public Roads*.

HOMESTEAD AND EXEMPTIONS. See *Insurance*, 1, 2.

1. When a bill filed by heirs at law against a widow for partition of land contains an alternative prayer that the widow be required to elect whether she will "take dower or a homestead," a de-

## HOMESTEAD AND EXEMPTIONS—(Continued.)

murrer that the bill does not state a case authorizing such relief ought not to be allowed if the case made by the bill sustains any material prayer for relief. *Brokaw vs. McDougall et als.*, 212.

2. A widow, not an heir of her husband, and who has elected to take dower, cannot claim a homestead in the lands of her husband under the homestead clauses of the Constitution. Her right is that of dower only, which is not affected by the homestead provisions. *Id.*
3. The homestead of a testator residing in this State, who dies leaving a wife and children, is not the subject of testamentary disposition. Such property remains as though no will had been made, and descends to the heirs subject to the right of dower. *Id.*
4. Money and evidences of debt are personal property and may be included in the selection of property exempt from any process of law, or from administration of assets to satisfy debts. *Carter's Administrators vs. Carter*, 558.
5. A waiver of any benefit of exemption laws, or an agreement that all the debtor's property shall be subject to levy and sale, contained in a promissory note, is inoperative as against the policy of the exemption laws. Otherwise as to a mortgage or pledge of specific property. *Id.*
6. When property which may be claimed as exempt from the satisfaction of debts has been sold or converted into funds by administrators, the heirs entitled may claim the value out of funds in the hands of the administrators. *Id.*
7. Heirs are entitled to the same right of exemption of property that the ancestor had before his death. *Id.*
8. An allowance by the Probate Court out of personal property for the temporary support of the heirs of the intestate must be accounted as part of the amount of personal property claimed by the heirs as exempt from the payment of debts. *Id.*
9. The bill alleges that M. was the owner of the improvements on land of the United States held and occupied as a homestead under the laws of the United States, and C., with the assent of M., sold the improvements and the possession of the land to D. for a valuable consideration partly paid, and C. gave to D. a writing reciting that he had sold his interest to D., and containing the following: "This is to show that I do stand good to M. D. for the above premises as a homestead for himself under the acts of Congress granting of homesteads to actual settlers." D. went into possession and made valuable improvements, and was proceeding to take necessary legal steps to secure a homestead title when C. clandestinely procured from the United States Land Office a

HOMESTEAD AND EXEMPTIONS—(*Continued.*)

certificate of entry of the land in the name of M. and then a deed from M. to himself and instituted proceedings against D. to oust him: *Held*, That the bill shows the conduct of C. was a violation of his agreement and a fraud upon the rights of D., and C. was estopped from asserting the right of possession against him; that C. is deemed a holder of the legal title in trust for D., and upon payment by D. of the balance due to C. upon the sale of improvements and possession, with interest from the time it became due, he will be entitled to a conveyance of the legal title if the allegations of the bill are sustained. *Chesser and Cone vs. DePrater*, 691.

HUSBAND AND WIFE. See *Statute of Descents*.

1. Under the act of 1872 defining the interest the wife shall take in her husband's property, if the husband dies out of this State intestate, without children, the widow is the sole heir at law. *Croll vs. Clark and Alsop*, 849.

INDICTMENT. See *Criminal Law*, 1, 6, 7, 8, 13, 14, 16, 17, 18, 19.INFANTS. See *Administrators and Executors*, 18; *Costs*, 3.

1. At the trial and before a cause is submitted to the jury, the proceedings may be amended by striking out the name of a plaintiff, and also by inserting the name of a next friend of a plaintiff who is shown to be a minor, under the sixth section of the Practice Act of 1861. *Neal vs. Spooner*, 38.
2. The omission of a next friend to give a bond to secure the proceeds of a judgment to be recovered cannot be assigned as error by the defendant on appeal. He is not injured or prejudiced, and it does not concern him. *Id.*

INJUNCTION. See *Mortgage*, 3; *Pleading (Equity)*, 4; *Taxes and Tax Titles*, 11, 12.

1. An oath to a bill for injunction by a solicitor, "that the facts set forth in the foregoing bill are true to the best of his knowledge, information and belief," is not sufficient to authorize an injunction. It states no facts, nor that affiant has any knowledge, information or belief whatever. *Ballard vs. Eckman & Vetsburg*, 661.
2. Where facts are stated on information the officer to whom application is made for an injunction should require the additional affidavit of the person from whom the information is derived, verifying the truth of the information. *Id.*
3. An irregular or improvident order granting a preliminary injunction, however erroneous, will not affect a final decree granted after a full hearing upon the pleadings and testimony. *Id.*

INJUNCTION—(*Continued.*)

4. A levy of general municipal taxes upon real and personal property in 1882 was not authorized by law, the power to assess having been abrogated by chapter 3024, laws of 1877, and the sale of land for taxes attempted to be levied in that year was properly enjoined. A dissolution of the injunction was erroneous. *Smith vs. Long*, 697.
5. Such injunction will not operate to prevent the future collection of taxes, the levy of which was validated by chapter 3477, laws, approved March 5, 1883. The validity of that act was sustained in the case of city of Jacksonville vs. Basnett, decided at this term. *Id.*
6. While the general rule is that an injunction will be dissolved upon answers denying all the equities of the bill, yet where parties are charged with fraud, unless the answers are *full and satisfactory*, the injunction, if right in the first instance, ought to be retained until the hearing. *Hayden vs. Thrasher*, 715.
7. Mere denials of fraud, or of fraudulent intent, without a full explanation of the facts disclosed in the bill and in affidavits filed in support of the bill, leave the question of fraud unsettled. *Id.*
8. The construction of a railway to be operated by steam along the streets of a municipal corporation to be used for a private purpose on a line of route not authorized by the character of the company proposing to construct it and authorized only by the municipal corporation in a resolution clearly beyond its powers, may be a public nuisance. But if so, it is to be abated by a suit in behalf of the State. The owner of land or lots abutting upon the street over which the railway is proposed to be constructed has not an equity to enjoin its threatened construction as a public nuisance, operating to his special and peculiar injury, where the road intended to be constructed is an ordinary surface railway to be operated by steam. *Garnett vs. Railroad Company*, 889.
9. A person in quiet possession of real estate as owner, may obtain an injunction to restrain others from dispossessing him by means of process growing out of litigation to which he was not a party. *Deans vs. Bowden*, 905.

INSOLVENCY AND INSOLVENT DEBTORS. See *Administrators and Executors*, 4; *Evidence and Witnesses*, 1; *Insurance*, 2.

## INSURANCE—

1. Two life insurance policies, each for one thousand dollars, are taken out by A payable to himself. He subsequently places on each policy in writing a direction to pay the money upon one policy to one person and upon the other policy gives a like direction to pay its proceeds to another person. There is no evidence that

INSURANCE—(*Continued.*)

the insured at the time these contracts or his direction was given was indebted: *Held*, That under the statute of this State the written direction proved to have been made by the insured, is a written declaration in the policy of the person for whose use and benefit it is intended, and that under the statute such named persons are entitled to the proceeds of the policies as against creditors of the deceased insured. *Eppinger, Russell & Co. vs. Canepa*, 262.

2. In a life insurance where the premiums paid are reasonable in amount, looking to the condition in life of the assured, and there is no proof of an actual purpose at the time the contract of insurance is entered into to divert the money from anticipated debts, and to defraud creditors, the statute protects the proceeds from the claims of creditors in favor of the beneficiary named in the policy, and upon the death of the assured whether he be solvent or insolvent the amount of such life policy is exempted and protected from the claims of creditors. *Id.*
3. Plaintiff procured a policy of insurance in defendant association, through an employee of an agent, and after it expired applied for a renewal, but declined to pay the premium and take the renewed policy, and it was cancelled. He afterwards requested the same employee of the same agent to insure his property, and paid part of the premium, but did not specify in what company he desired to be insured, the same agent being the agent of several companies and no policy was issued. After destruction of the property by fire he paid the employee the balance of the premium, but the agent returned the money, declining to issue a policy. Defendant had no knowledge that the employee had anything to do with their business. Upon these facts, the plaintiff had no contract for insurance in defendant association. *New Orleans Ins. Association vs. Boniel*, 815.

INTEREST. See *Principal and Interest*.

INTERNAL IMPROVEMENT LAW. See *Municipal Corporations*, 8, 11; *Public Roads*.

JOINDER OF PARTIES. See *Pleading (Law)*, 11.

JOURNALS OF THE LEGISLATURE. See *Constitutional Law*, 1, 2.

## JUDGE OF PROBATE—

1. Under the Constitution of this State in force in 1857, the Judge of Probate was lawfully made a County Commissioner by act of the Legislature. *Lucas vs. Jefferson County*, 980.



**JURISDICTION.** See *Constitutional Law*, 5; *Courts, Equity and Equitable Jurisdiction*.

1. In cases of concurrent jurisdiction in different tribunals, the one first exercising such jurisdiction acquires control to the exclusion of the other. *Boswell vs. State*, 869.

**JURORS AND JURY.** See *Constitutional Law*, 3. 6.

1. The question, whether a person drawn as a juror is sufficiently intelligent to sit in a case, may be determined by the court in the exercise of sound discretion. *Lewis vs. Jefferson County*, 980.
2. In a suit against a county upon its bonds, when the validity of the bonds is in question, a holder of similar bonds may be challenged for cause when drawn as a juror. Being interested in the question to be tried is cause of bias as a matter of law. *Id.*

**LABORER'S LIEN.** See *Lien*, 1.

**LACHES.** See *Statute of Limitations*, 1.

**LANDLORD AND TENANT.** See *Constitutional Law*, 3, 5; *Writ of Error*, 2.

1. The statute giving a lien and remedy to the landlord for rent and advances enters into and forms part of the agreement for leasing. *Blanchard and Burrus vs. Raines*, 467.
2. A note promising to pay a sum of money for rent of land to which is appended a stipulation that if this note and another for the same amount shall be promptly paid when due the payee shall make title to the land to the maker of the notes, otherwise the amount to be deemed as rent only is but a promise to pay rent, which may become purchase money upon full compliance by the lessee. *Id.*
3. The landlord's lien for rent and for advances as provided by the acts of 1879 and 1881 may be enforced by a single distress warrant, covering both claims; the claim for advances being a lien upon the crop only while the lien for rent may be satisfied out of the crop and other property kept on the premises. *Id.*
4. In proceedings under the unlawful detainer act against a tenant to recover possession, the tenant cannot show as a defence that his lessor had no title, or that his title was defective, or that it was only an equitable title. The tenant's liability does not depend upon the rights of third persons but on his contract with the lessor. *McLean vs. Spratt*, 515.
5. A demand of a tenant by his landlord of the amount of rent due, is a sufficient demand of the *precise sum* due without naming the amount, in a suit to recover possession for non-payment. *Id.*
6. Double the rental value of premises is not recoverable in a suit for an unlawful detainer unless it appears affirmatively from the testi-

LANDLORD AND TENANT—(*Continued.*)

mony that the detention was wilful and knowingly wrongful on the part of the tenant. *Id.*

7. Where in the proceedings in a case like the present there is no error found on appeal, except that the jury have given excessive damages and the correct amount is easily ascertainable, the judgment will be reversed unless the excessive amount of damage is remitted. *Id.*
8. Costs in this court taxed against appellee. *Id.*

LEGACIES AND LEGATEES. See *Wills*, 3.

LEGISLATURE AND LEGISLATIVE POWER. See *Constitutional Law; Journals of the Legislature.*

1. The forms of administering justice and the powers of the courts are subjects of Legislative control. *Blanchard and Burrus vs. Raines*, 467.

LICENSES. See *Constitutional Law*, 1, 2.

1. The act of March 3, 1883, to regulate the sale of intoxicating liquors, wines and beer, provides that an applicant for a license shall present a petition asking the Board of County Commissioners to grant the right "to sell such liquors, wines or beer." A petition asking for a license "to sell spirituous or intoxicating liquors, wines and beer," is a good and sufficient form of application under the act. *State ex rel. vs. Commissioners*, 425.
2. That law imposes upon the County Commissioners the duty to act upon a petition for a license to sell intoxicating liquors, and if such application is properly signed, authenticated and published, they should grant it. They have no discretion or authority to prohibit the sale of liquors by refusing to act upon a proper petition. *Id.*
3. If the law had failed to require the Board of Commissioners to act upon such applications, it would have been totally inoperative to accomplish its expressed object. "Courts, in construing a statute, should, so far as the language will admit, give such a construction as will make it practicable, just and reasonably convenient." *Id.*
4. A petition for a license signed by less than the majority of voters of the district was denied. At the ensuing regular meeting an additional number of names, thus making a majority, was affixed to the original petition on file and the whole duly authenticated and published: *Held*, That though courts would consider such signing of a paper already on file in judicial proceedings irregular, yet in transacting the ordinary business of the community by plain people in a simple manner the strict rules of courts

LICENSES—(*Continued.*)

should not be enforced, no fraud being imputed. And if the petitioner shows that a majority have expressed themselves it is of no consequence whether the additional names are signed to the original or to an additional petition of the same import. *Id.*

5. When a petition for license to sell liquors, signed by the requisite majority of voters, duly authenticated and published, is presented to the Commissioners under the act, the applicant is entitled by law to the affirmative action of the Board; and the Board cannot be influenced by petitions or other interference by remonstrance or by requests to erase names of signers. After the petitioner has instituted his proceedings, his acquired private right cannot be taken away by other persons attempting to discontinue them. *Id.*

**LIEN.** See *Decrees and Judgments*, 3, 5; *Landlord and Tenant*, 1, 3; *Married Women*, 2.

1. No lien inures under Chapter 3132, Laws, in favor of a laborer for a sub-contractor against a railroad company where the only privity of contract existing is between the company and the first contractor. *Howard vs. Moore et al.*, 163.
2. An assignment by a debtor to a creditor of his interest in lands of his father's estate in which he has a fee in remainder, the assignment not being recorded, is not valid in law or in equity as against the lien of a subsequent judgment against the debtor in favor of a third party who had no notice of the assignment. *Eldridge, Dunham & Co. vs. Post*, 579.
3. A judgment against a tenant in common or copartner is a lien upon the interest of the debtor in the land, and if upon a partition this interest is converted into money, the priority of the judgment lien is preserved as against the fund. *Id.*
4. The lien of a creditor under a creditor's bill has no preference over the lien of prior judgments against lands which were subject to levy under execution. The priority of lien of a judgment creditor by the filing of a creditor's bill exists as a reward of diligence in the discovery of and subjecting assets of the debtor which were not within the reach of execution at law; and is not allowed as against a prior judgment which was a lien at law upon property subjected and converted into money by a sale in partition proceedings. *Id.*
5. The statutes of this State relating to mechanic's liens, authorizing an executory contract to be followed by a personal judgment, do not embrace married women. *O'Neil vs. Percival*, 937.

**LIFE INSURANCE.** See *Insurance*, 1, 2.

**LIQUORS AND LIQUOR DEALERS.** See *Licenses*.

**MANDAMUS.** See *Appeals*, 1.

1. An appeal to the court on moral grounds to withhold a writ of mandamus requiring the issuing of a license to sell intoxicating liquors, and thus to annul a valid act of the Legislature by refusing to enforce it, is addressed to the wrong tribunal. The moral standard of individual judges is not the proper boundary of legislative discretion. *State ex rel., vs. Commissioners*, 425.
2. The pendency of another proceeding by mandamus may be pleaded in abatement, where the parties and the matter are the same, the practice being assimilated to that in other civil suits. *State ex rel. vs. Commissioners*, 859.

**MARRIED WOMEN.** See *State of Descents*.

1. The statutes of this State relating to mechanic's liens, authorizing an executory contract to be followed by a personal judgment, do not embrace married women. *O'Neil vs. Percival*, 937.
2. In the premises of a deed to a married woman the words of transfer are, "grant, bargain, sell, alien, convey and confirm unto the said party of the second part, her heirs and assigns," and the words in the *habendum* and *tenendum* clause of the deed are "to have and to hold the aforesaid bargained premises, together with all and singular the rights, tenements, hereditaments and appurtenances to the same belonging, unto the said party of the second part, her heirs and assigns, to her and their own sole and proper use, benefit and behoof in fee simple:" *Held*, That no equitable separate estate passes, and that the wife holds the property as her separate statutory property. *Harwood vs. Root*, 940.
3. A married woman purchases property. She and her husband join in the execution of a promissory note for the purchase money. That the husband is insolvent is known to the vendor, and the credit is given, looking to the separate statutory property of the wife: *Held*, That a court of equity will sequester the rents and profits of the separate statutory property of the wife to secure payment of the debt. *Id.*

**MASTER IN CHANCERY.** See "Accounts and Accounting," 1: *Practice (Equity)*, 1, 2, 3, 11, 12, 13.

**MECHANIC'S LIEN.** See *Married Women*, 1.

**MERCANTILE LAW.** See *Bills of Exchange; Damages*, 1, 2, 3, 4.

1. The effect of a consignment of goods generally is to vest the property in the consignee, but if the bill of lading is special to deliver the goods to the consignee for the use of or on account of a

**MERCANTILE LAW—(Continued.)**

party not the consignee the property vests in such party. *Richardson vs. Hutchinson*, 21.

2. In such case the bill of lading is *prima facie* evidence of the fairness of the transaction, and is sufficient to raise a presumption of property in the person for whose use and account the consignment is made. *Id.*
3. Where, however, the consignment thus made is by an insolvent debtor and there are facts and circumstances from which the jury might infer that the transaction was colorable and fraudulent, and that there was nothing due to the party on whose account the shipment was made, a verdict of a jury thus finding, approved by the Circuit Court, should not be set aside by this court. *Id.*
4. General statements of an insolvent debtor as to the amount of his indebtedness to one of two contending creditors, both the insolvent debtor and such one of the contending creditors failing to give an itemized account or clear exhibit of the alleged debt, cannot be regarded as conclusively establishing the debt in a case surrounded with other suspicious circumstances. *Id.*

"MONEY PAID, &C." See *Statute of Frauds*, 3.

**MORTGAGE.** See *Deed*, 3, 4; *Tender*, 2; *Evidence and Witnesses*, 5.

1. When a mortgage debt has been paid, and the mortgage afterwards assigned in form, and then foreclosed by the assignee without making the holder of the legal title a party to the foreclosure, in a suit by the latter to set aside the foreclosure decree, and the deed executed under it as a cloud upon his title, the mortgagees are not necessary parties. *Matheson vs. Thompson*, 790.
2. Where two mortgages upon different parcels of property are given to secure the same debt, a payment and satisfaction of one is a satisfaction of both mortgages. *Id.*
3. A foreclosure being had by the assignees of a satisfied mortgage under which a decree and deed are procured, a grantee of the mortgagor not being made a party, and having no notice of the proceeding until after a sale under the decree, such grantee may maintain a suit in equity to enjoin the parties from conveying or asserting claim to the property, and to annul such decree and deed, the same being a cloud upon his title. *Id.*
4. A prayer by cross bill for a partition, in a suit brought to foreclose a mortgage, cannot be entertained. *Matthews vs. Lindsey*, 962.
5. When a deed in form, is a mortgage in law and equity. *Walls vs. Endell*, 86.

**MOTIONS.** See *Dismissal of Actions; Continuance*.

**MUNICIPAL CORPORATIONS.** See *Constitutional Law*, 7, 8, 9; *Contracts*, 1, 2, 3, 4; *Injunctions*, 4, 5; *Taxes and Tax Titles*, 4, 5, 6, 11, 12; *Nuisance*; *Writ of Error*, 3, 4.

1. The act of the Legislature of 1877, Chapter 3025, amending section 29 of the act of 1869, (providing for the incorporation of cities and towns,) authorized the County Commissioners to prescribe new boundaries of an incorporated town, when, on the petition of five registered inhabitants of the town setting forth that "the boundaries of the town are of unreasonable and unnecessary extent," it shall be found by the Commissioners that the boundaries of such town "are extended beyond necessary and useful limits, and include an undue amount of vacant farming lands." Another section of the act of 1877, authorized the County Commissioners to enlarge the boundaries of any city or town on the application of the corporate authorities thereof. Under this act the County Commissioners had no power to change the territorial limits of the town of LaVilla, Duval county, except upon the ground that the boundaries were "extended beyond necessary and useful limits, and include an undue amount of vacant or farming lands;" and these premises not existing, the order of the County Commissioners, made in December, 1877, reducing the limits of LaVilla, was unauthorized and void. *City of Jacksonville vs. L'Engle*, 344.
2. It was not lawful for the Commissioners to sever a portion of the territory of LaVilla for the sole purpose of annexing the same to the City of Jacksonville. *Id.*
3. The proceedings of tribunals created by law must be shown to be within the powers expressly granted, and acts done by them not within such prescribed limits are nugatory. *Id.*
4. The act in question was not inimical to the Constitution as conferring judicial functions upon County Commissioners; the powers conferred were not judicial within the meaning of the Constitutional restriction; they involved only the exercise of ordinary judgment and discretion in reference to the public interest and convenience, like that required in locating roads, bridges and other such affairs. *Id.*
5. Under the law of municipal corporations in this State they are authorized up a vote of the electors to issue bonds to meet municipal expenses or for any municipal purpose. The statutes require that the amount to be issued, as well as the issuing of such bonds, shall be thus submitted to the electors, and in the event a required majority is given makes it the duty of the City Council to assess and collect such taxes from the citizens as are

MUNICIPAL CORPORATIONS—(*Continued.*)

necessary for the payment of the interest as well as for the final payment of the bonds. The tax so directed to be levied is not a "special tax," within the meaning of chapter 3313, Laws of 1881. *Sullivan vs. Walton*, 552.

6. There are outstanding bonds of a city which the city desires to compromise by an issue of new bonds to take up the outstanding bonds. The question of the issue of the bonds and the amount to be issued is submitted to the qualified electors of the city; the required majority is given for the issue and the amount to be issued; the statute in this event made it lawful for the bonds to be issued: *Held*, That the recital by the Mayor and Council in the proclamation submitting these questions that they were assured that the old bonds would be surrendered was no condition under the law for the issuing of the new bonds, and that the new bonds thus issued, if within the amount authorized and otherwise legal in the nature of their obligation under the statute, were valid and binding obligations upon the city. *Id.*
7. In such case the fact that the courts of the United States are entertaining jurisdiction to enforce the old bonds against the city does not prevent the city authorities from levying a tax to pay the new bonds to the extent to which an exchange has been made. *Id.*
8. In declaring against a county or municipal corporation which has no general authority to issue bonds, in a suit upon bonds issued under a special act of the Legislature, (to wit: the 22d section of the Internal Improvement Act of 1855, which does not designate any particular county,) the power to issue the bonds must appear by distinct averment of the special authority conferring the right, unless such special Authority appears by the bond annexed to the declaration. *Lewis vs. Jefferson County*, 980.
9. In a suit against a county upon its bonds, when the validity of the bonds is in question, a holder of similar bonds may be challenged for cause when drawn as a juror. Being interested in the question to be tried is cause of bias as a matter of law. *Id.*
10. Under the Constitution of this State in force in 1857, the Judge of Probate was lawfully made a County Commissioner by the act of the Legislature. *Id.*
11. Bonds of a county did not, upon their face, recite the authority of law under which they were issued. The record of the proceedings of the Board at the time the bonds were ordered to be issued recited: "Be it known that after public notice duly given the question was submitted to a vote of the legal voters of Jefferson county, on the 7th of May last, whether this county should sub-

MUNICIPAL CORPORATIONS—(*Continued.*)

scribe for stock in the Pensacola and Georgia Railroad Company, and it was decided in favor of such subscription by a majority of 278 votes out of 297, being all the votes polled. Now, therefore, the Board of County Commissioners of Jefferson county, by virtue of the said vote and of the power and authority on them conferred by an 'act to provide for and encourage a liberal system of Internal Improvements,' approved 6th January, 1855, have determined to subscribe," &c.: *Held*, (the Pen. & Ga. R. R. being one of the roads contemplated in the act,) that as against a *bona fide* holder of the bonds, this recital in the record of their proceedings by the Commissioners estopped the county to deny that the election was duly held according to law and that the Board subscribed for stock as stated in the record. *Id.*

12. The rate of interest contracted to be paid attends the contract until the principal is paid or the contract extinguished, where the debtor has violated his agreement to pay by a certain day. Any other rule might make it profitable to violate contracts, a doctrine not conducive to commercial morality and integrity. *Id.*
13. In 1857 counties had no official seal. The seal of the Judge of Probate or any other device in the form of a seal attached to a county bond was a good sealing. *Id.*

MUNICIPAL ORDINANCES. See *Contracts*, 1, 2, 3, 4.

MUNICIPAL SECURITIES. See *Bonds*.

## NEGLIGENCE—

1. A declaration setting out the facts that the plaintiffs on a certain day, at defendant's request, let to hire and delivered to the defendant a certain horse, the defendant promising to use the same in a careful, moderate and reasonable manner while he so had him on hire, but alleging that he did not use the horse in a careful, moderate and reasonable manner, and that by reason of negligence and carelessness on the part of the defendant, the horse ran away and became injured, damaged, sick and worthless, is a declaration upon a contract of bailment, and the liability of the defendant arises out of such contract. *West vs. Blackshear & Co.*, 457.
2. An action of this character, upon such contract of bailment, may be maintained against the bailee for any neglect or breach of duty, by which the bailors were damaged. *Id.*
3. The question of negligence being one of fact, is peculiarly for the jury. The evidence in this case was conflicting, and the jury having found by their verdict that the bailee was duly warned by the bailors of the fault or bad quality of the horse, it was his



## NEGLIGENCE—(Continued.)

duty in the use of the horse to exercise such care and prudence as would ordinarily be required to guard against mishap from such fault of which he had been warned. *Id.*

4. Common or ordinary diligence, in the sense of the law, is such as men of common prudence generally exercise about their own affairs. *Id.*

**NEW TRIAL.** See *Appeals*, 12, 13, 14; *Arrest of Judgment*; *Charge of Judge to the Jury*, 2, 8; *Contracts*, 4; *Replevin*; *Practice (Equity)*, 19.

1. When the record contains all the evidence introduced in the case, and upon a careful examination it is clear it does not warrant the finding of the jury, this court will reverse the judgment. *Williams vs. State*, 391.
2. If upon an inspection of a book of accounts brought up in the record, this court cannot see that the court below, in excluding such book, exceeding its authority or discretion, it will not reverse the judgment of such court. *Dunbar vs. Wright's Administrator*, 446.
3. Where there is a conflict of testimony given on a trial before a referee, and his finding is in favor of a party upon the facts, this court will give the same effect to the finding as to the verdict of a jury, especially where such finding is supported by a preponderating number of witnesses who are not impeached. *McClenny vs. Hubbard*, 541.
4. The rule is well settled that an exception to the charge of the court to the jury must be taken to the identical portion or paragraph of such charge as is alleged to be error; and that an exception to the entire charge is not sufficient if a single proposition therein is good. 17 Fla., 643, and cases cited. *Carter vs. State*, 754.
5. Under Chapter 3431, Laws 1883, the party may, after verdict rendered, "embody in a motion for new trial any portion of the charge of the Judge which may be deemed erroneous, but he must embody in such motion only such portion of the charge as is alleged to be erroneous. That statute does not change the rule. It only gives to the party an opportunity to except after verdict rendered. *Id.*
6. Where the whole evidence in a criminal case is brought up by a writ of error and fails entirely to prove the charges made in the indictment, this court will reverse the judgment and award a new trial. *Small vs. State*, 780.
7. In a criminal case a new trial will be granted when all the evidence

NEW TRIAL—(*Continued.*)

taken in the court below fails to establish the venue as laid in the indictment. *Cook vs. State*, 802.

8. When the bill of exceptions in such a case embraces the testimony and does not show the value of the property so charged to have been stolen, and this court cannot see that the proper verdict has been found, the court will award a new trial. *Whitehead vs. State*, 841.
9. Where there is simple conflict in the testimony, the findings of a referee will not be disturbed. *Wharton vs. Hammond*, 934.

NEXT FRIEND. See *Infants*, 1, 2.

NOTICE. See *Constitutional Law*, 5; *Deeds*, 3, 4.

## NUISANCE—

1. The construction of a railway to be operated by steam along the streets of a municipal corporation to be used for a private purpose on a line of route not authorized by the charter of the company proposing to construct it and authorized only by the municipal corporation in a resolution clearly beyond its powers, may be a public nuisance. But if so it is to be abated by a suit in behalf of the State. The owner of land or lots abutting upon the street over which the railway is proposed to be constructed has not an equity to enjoin its threatened construction as a public nuisance, operating to his special and peculiar injury, where the road intended to be constructed is an ordinary surface railway to be operated by steam. *Garnett vs. Railroad Company*, 889.

OFFICERS. See *Municipal Corporations*, 1, 2, 3, 4; *Referees*; also, *the several particular officers*.

## PARENT AND CHILD—

1. It is a presumption of law, that the father is not bound to pay a child, though of full age, for services while living with him at home, and as one of the family, but this presumption may be overcome by proof of a special contract, or an express or implied promise or understanding; and such implied promise or understanding may be inferred from the facts and circumstances shown in the evidence. *Mills et ux. vs. Joiner*, 479.
2. The plaintiff, a female of full age, agreed to work for her father, as she testifies, during his life, or until she was discharged; that the father agreed to convey her a certain piece of land as compensation for her services. The agreement was not in writing; she so worked for her father for twelve years; he then discharged her and conveyed the land to a third person. She brings an action at law for her services. The court instructed the jury in substance that the plaintiff could only recover the land, or the value

## PARENT AND CHILD—(Continued.)

of it, and if there was no evidence of the value of the land, the verdict should be for the defendant: *Held*, to be error. The agreement not being in writing, and being for the conveyance of land, she could not maintain an action for specific performance, but could upon a *quantum meruit*. *Id.*

**PAROL EVIDENCE.** See *Evidence and Witnesses*, 3, 5; *Trusts and Trustees*, 3.

**PARTIES.** See *Appeal*, 4; *Ejectment*, 5; *Injunction*, 8; *Mortgage*, 1, 2, 3; *Pleading (Law)*, 11; *Wills*, 3; *Writ of Error*, 3, 4.

1. Where a plaintiff seeks to be subrogated to satisfied judgment liens on the ground that moneys loaned by him to the defendant in execution were so loaned for the purpose of paying such judgments, and were so applied, the judgment creditor is not a necessary party in a case where no decree is prayed against him. *Fridenburg vs. Wilson*, 359.
2. A suit in equity by one or more members of an unincorporated association for the purpose of mutual fire insurance, seeking the appointment of a receiver of the property of the association and the continuance of its business by him, should be brought against the other members of the association and not against its executive officers alone. *Montgomery vs. Knox*, 372.
3. In a suit upon a contract made with a party since deceased, his legal representatives are necessary parties. *Marks vs. Baker*, 920.

**PARTITION.** See *Appeals*, 18; *Decrees and Judgments*, 7, 8, 9; *Dower*, 1, 2, 3; *Mortgage*, 4.

1. A decree in partition appointing commissioners and directing them to ascertain the interests of the parties, and to make partition accordingly, is irregular. The court should ascertain and adjudicate the several interests of complainants and defendants, and direct the commissioners to make the division accordingly. *Street vs. Benner*, 700.
2. A decree of partition should not be made until the defendants shall have answered or a decree *pro confesso* is entered as to those who have been summoned by subpoena or by publication. *Id.*
3. A court of equity is not the proper tribunal for trying the legal title to lands; but by the statutes of this State regulating proceedings in partition, where the bill shows the court has jurisdiction, and the complainant's title is put in issue by the defendant's pleadings, the court is authorized to "ascertain and adjudicate the rights and interests of the parties," and decree a partition "if it shall appear that the parties are entitled to the same," without requiring the legal title to be first tried in a court of law. *Id.*

**PARTNERS AND PARTNERSHIP.** See *Administrators and Executors*, 10; *Evidence and Witnesses*, 8; *Practice (Equity)*, 1, 2, 3, 4, 5.

1. One of two partners, as attorneys at law, has a right to share in sums realized by the other as commissions for sales of stock in a railroad company where such sales are embraced in the ordinary usages and customs of the business of an attorney at law in the locality where it was carried on. *Sanderson's Administrators vs. Sanderson*, 292.
2. The surviving member of a firm uses an account of the firm, supposed to have accrued before the death of the deceased partner, against one of their clients in a transaction with such client by which he, the survivor, makes the claim available and uses it. Upon an accounting between the heirs and distributees the surviving partner is properly chargeable with such claim as an asset of the firm, notwithstanding the party allowing the claim swears no such sum was due. This in a case where the party thus settling the account waived, at the time, all right he may have had to recover the amount from the firm or any member thereof. *Id.*
3. A surviving partner cannot object that interest upon a balance found due by him upon an accounting before a master between him and the heirs and distributees of the deceased partner, is allowed from the date the amount is ascertained, and the balance struck by the master. *Id.*
4. A bond given on suing out a writ of attachment by a copartnership firm, signed and sealed by one of them in the copartnership name, the signing having been authorized by the other by parol or ratified by parol, is a sufficient bond of both partners. *Jeffreys vs. Coleman*, 536.

**PAYMENT.** See *Mortgage*, 1, 2.

**PETITION PRO INTERESSE SUO—**

4. When in partition of land a sale has been made and the property converted into money, a proper and usual mode of bringing forward the demands of creditors who have a right to satisfaction out of the funds is to intervene by petition. *Eldridge, Dunham & Co. vs. Post*, 579.

**PLEADING—**

**EQUITY.** See *Bill of Interpleader*; *Fraudulent Conveyances*, 2; *Homestead and Exemptions*, 1; *Injunction*, 1, 2; *Licenses*, 1; *Mortgage*, 4; *Partition*.

1. Where the facts are set forth in the original bill, an amendment simply stating a conclusion of law deemed to follow from those facts, such as a general charge that an act was the result of

## PLEADING—(Continued.)

fraud, accident or mistake, no specific act of fraud, accident or mistake being alleged, may and should be treated as surplusage. While this is bad pleading, its effect cannot be to destroy equities otherwise alleged and shown upon the hearing to exist. *Gale et ux. vs. Harby et als.*, 171.

2. When a bill filed by heirs at law against a widow for partition of land contains an alternative prayer that the widow be required to elect whether she will "take dower or a homestead," a demurrer that the bill does not state a case authorizing such relief ought not to be allowed if the case made by the bill sustains any material prayer for relief. *Brokaw vs. McDougall et als.*, 212.
3. Where the responses of the answer are as broad as the allegations and interrogatories of the bill, there is replication to the answer, and the general facts to be proved are put in issue by the pleadings, it is sufficient. Proof of a fact not specifically alleged, but embraced substantially in the case made by the answer and the bill is admissible. *Eppinger, Russell & Co. vs. Canepa*, 262.
4. The rules of the Circuit Court in Equity require that when an injunction, receiver or other special order before final decree is desired it shall be specially asked for in the bill. Rule 25. *Clark vs. Rugg*, 861.

**LAW.** See *Bill of Particulars*; *Ejectment*, 2; *Evidence and Witnesses*, 5; *Municipal Corporations*, 8.

1. Under the plea of not guilty in ejectment special pleas under the statute of limitations should be struck out. Evidence to prove adverse possession, or an adverse title, may be given under the general issue. *Neal vs. Spooner*, 38.
2. At the trial and before a cause is submitted to the jury, the proceedings may be amended by striking out the name of a plaintiff, and also by inserting the name of a next friend of a plaintiff who is shown to be a minor, under the sixth section of the Practice. Act of 1861. *Id.*
3. Under the plea of not guilty in an action of ejectment, the defendant may prove an adverse possession. Chapter 3244, Laws of 1881, does not change the rule in this respect. It provides only that if the defendant wishes to *deny* possession of the premises, or wishes to *deny* that he claims adversely to the plaintiff, or to his title, it must be done by special plea. *Horne vs. Carter's Administrators*, 45.
4. A plea claiming to be a plea "on equitable grounds," but which sets up no fact upon which the defendant, if judgment was ob-

## PLEADING—(Continued.)

- tained against him, would be entitled to relief against it, may be stricken out on motion, or by sustaining a demurrer. *Id.*
5. The power of the court under the statute to allow amendments applies to the amendment of a petition for the re-establishment of lost papers. *Hart's Executor vs. Smith*, 58.
  6. After a cause is remanded by the Supreme Court to the Circuit Court for further proceedings, such court has power to admit amendments to be made to the pleadings and proceedings, unless the Supreme Court otherwise directs. *Id.*
  7. When a party has by pleading waived an objection which might have been taken it is too late after action of the court upon such pleading to withdraw it for the purpose of raising the objection so waived. *Id.*
  8. In ejectment all matters of legal defence (excepting special denials of possession and denials of adverse claim under the statute) may be given in evidence under the plea of not guilty. Special pleas of matter affecting the legal title or in estoppel should be struck out. A judgment sustaining a demurrer to such pleas will not preclude proof at the trial of the facts pleaded. *Coffee vs. Groover*, 64.
  9. A defence on "equitable grounds" may be interposed in ejectment by plea under the practice act of 1861. Such facts may be pleaded as would entitle the defendant to an injunction against enforcing the judgment if he filed a bill alleging the same and prayed an injunction. *Walls vs. Endell et al.*, 86.
  10. A defence on equitable grounds in ejectment, the plea alleging that defendant was the owner of the property, and that plaintiff's title though a deed absolute in form, was executed as a security to the plaintiff for money and other advances by him to the defendant, is good; and if proved will entitle the defendant to a verdict. Such deed is in law and equity a mortgage, and the remedy upon it is by foreclosure and sale for the amount secured. *Id.*
  11. Where the declaration sets up a cause of action enuring jointly to several parties, and it appears upon its face that only some of the joint contractors are plaintiffs, (no death or other fact showing survivorship of the right of action in the plaintiffs being set up.) it is a demurrable defect, and a demurrer of plaintiffs to defendant's pleas in bar should be overruled, whether the pleas in bar set up a good defense or not. *City of Jacksonville vs. Aetna S. F. E. Co.*, 100.
  12. Declaration alleging that defendant employed plaintiff as civil engineer to take charge of construction of a road and authorized to

PLEADING—(*Continued.*)

employ and hire teams and transportation in the course of such employment at defendant's expense, and plaintiff employed and paid for teams, &c., in the performance of his duties, is not demurrable. Such contract entitles him to be reimbursed for reasonable outlay for means of transportation. *P. & A. R. R. Co. vs. Atkinson*, 450.

13. When in action upon a contract the defendant pleads that he "did not promise as alleged," and also pleads specially that the plaintiff contracted with him as an agent of another and not otherwise, and that plaintiff knew this fact at the time of contracting, such special plea is only a repetition of the general plea that the defendant did not promise as alleged. *Walter vs. Florida Savings Bank*, 826.
14. The overruling of plaintiff's demurrer to such special pleas may, therefore, have been erroneous, but such ruling did not change the issues or affect the legal rights of the parties. Such pleas only encumbered the record. *Id.*
15. Where upon the trial of such cause a verdict is found for the defendant, but upon appeal the record does not show the testimony nor the rulings of the court thereon, nor the charge of the court to the jury, nor any exceptions, this court cannot reverse the judgment on account of the overruling of the demurrer to the pleas, as it does not appear whether the court admitted improper testimony in behalf of defendants, nor indeed that the plaintiff introduced any testimony in the case to support the declaration. *Id.*
16. When upon a motion to strike out a plea for want of sufficient verification, the court in deciding the motion expresses an opinion as to the effect of the verification upon a question which may arise upon the trial, an exception does not lie to such opinion, it being not material upon the motion to strike out, though it may be material when evidence is tendered. *Lewis vs. Jefferson County*, 980.

PLEA "ON EQUITABLE GROUNDS." See *Pleading (Law)*, 4, 9, 10.

PLEAS. See *Pleading*, 10.

POWERS. See *Evidence and Witnesses*, 15, 16; *Wills*, 1, 2.

PRACTICE. (*For Appellate Practice see such title.*)

EQUITY. See *Administrators and Executors*, 4; *Bill of Interpleader*; *Dower*, 1, 2, 3; *Injunction*, 8; *Evidence and Witnesses*, 9; *Mortgage*, 1, 2, 3; *Parties*, 1, 2; *Partition*; *Pleading*; *Referee*.

1. When a reference is made to a master to take and state a partner-

## PRACTICE—(Continued.)

ship account, the report should state the account in such manner that the court may judge whether it is correct. It should state the account at length and his findings so that they will be intelligible, and that the court may see the correctness of the master's inferences. *Nims vs. Nims*, 204.

2. A master's report that he finds a balance in favor of a partner in book A, and a balance against him in another book, is not an intelligible statement of an account, showing whether it is correct or not. *Id.*
3. A stipulation that an order confirming a master's report, no exceptions having been filed, shall be set aside on the final hearing if it be made to appear that there are grounds of exceptions to the report; and it appearing that the report is not correct nor intelligible, the order of confirmation should be vacated and exceptions allowed to be filed. *Id.*
4. On bill to dissolve a partnership and for an accounting, the fact of a co-partnership should be decreed before the defendant is required to account. *Id.*
5. A final decree as between partners ought not to be made until the debts of the concern are ascertained and adjusted. *Id.*
6. The 45th Rule of Chancery Practice prescribes the time in which an answer after appearance should be filed by the defendant, and the 51st Rule prescribes the time in which the defendant, after his demurrer to plaintiff's bill is overruled, shall file his answer. In neither case is the plaintiff required by these rules or the general rule upon the subject of notice (Rule 3) to take any action to authorize him to enter an order that the bill be taken *pro confesso* in the event the answer is not filed as required by the rules mentioned. *Stribling et ux. vs. Hart's Executrix*, 235.
7. After entry of the order that the bill be taken *pro confesso*, the plaintiff may at once, and without notice, cause the matter of the bill to be decreed at any time, if the same can be done without an answer and is proper to be decreed, that is to say, he can have such decree as the equities disclosed by his bill authorize. *Id.*
8. When the bill is thus taken *pro confesso* and final decree had, it is, under Rule 45, a decree *nisi*, subject to be opened upon cause shown upon motion and affidavit and upon terms, and does not become "absolute" until the expiration of twenty days after the rendition thereof. After the expiration of this time, without any action by the defendant, the decree becomes final and "absolute." There is no difference arising out of the fact that under the statute this final decree is entered out of term between it



## PRACTICE—(Continued.)

and a decree entered in term; and the proceeding is in a strict sense a record by which the rights of the parties in controversy are finally adjudicated. *Id.*

9. While it appears that the Circuit Courts of the United States have not power to open such decrees absolute and enrolled, upon motion, and that their power is confined to such proceedings as may be had by bill of review, rehearing or original bill, still under the uniform practice in the State courts such a power is admitted to exist, and may be exercised under certain circumstances, and as a motion is the only means by which the decree may be opened, and a defence upon the merits let in, although the party may be guilty of no laches, and his failure to set up his rights in the time required may be occasioned *by causes beyond his control, and by obstacles insuperable in their character, and he may have a good defence*, we think the rule of the State court as to the matter of power is the better rule, and we adopt it. *Id.*
10. The power to open such decree, however, is not to be exercised in cases where the decree has been made absolute in the regular course, and the defendant has been guilty of neglect and failure *Id.*
11. The subject of an exception to the report of a master and the finding of a referee is a particular account which the master has stated from the books. The exception is overruled by the referee, he finding upon comparison of the account with the books from which it is taken that it is correctly stated. This court must, under these circumstances, presume the account to be correctly stated, the books not being before us. *Eppinger, Russell & Co. vs. Canepa*, 262.
12. It is too late to urge here exceptions to accounts which the referee finds were admitted by the party when before the master, the record disclosing that the accounts went before the master without objection. *Id.*
13. Exceptions to a master's report, taken after the entry of an appeal from the order made by the court upon the report, cannot be heard. *Sanderson's Administrators vs. Sanderson*, 292.
14. The creditors of a dissolved insolvent corporation may seek a court of equity to subject its real property and effects to sale to satisfy its debts without proceeding at law to judgment, execution and return of *nulla bona*. In this case the time in which, by the statute, the existence of the corporation for the purpose of being sued was continued had expired. *Howe vs. Robinson*, 352.

## PRACTICE—(Continued.)

15. When in partition of land a sale has been made and the property converted into money, a proper and usual mode of bringing forward the demands of creditors who have a right to satisfaction out of the funds is to intervene by petition. *Eldridge, Dunham & Co., vs. Post*, 579.
16. A decree *pro confesso* must be reversed where the record discloses that it is based upon an order striking out a plea, which order does not appear to have been made after entry of the motion to strike on the chancery order book or after notice of any other character to the defendants. *Eldridge et ux. vs. Wightman & Christopher*, 687.
17. When a decree *pro confesso*, regularly entered, has become absolute the complainant is entitled to such relief as may be had upon the facts stated in his bill, and the decree *pro confesso* should not be set aside upon mere motion; but if the bill shows no ground for relief and the court sets aside the decree *pro confesso*, complainant cannot, on appeal, reverse the order setting it aside, as he has no equities, but his bill should be dismissed without prejudice. *Marks vs. Baker*, 920.
18. It is within the sound discretion of the Chancellor to receive evidence at the hearing not introduced before the master. *Matthews vs. Lindsay*, 962.
19. Though a Chancellor may have erred in allowing an original deed to be put in evidence without proving its execution, yet where the pleadings and other evidence are such that the introduction of the original was immaterial and unnecessary to a proper disposition of the case and did not affect the decree, the error will be disregarded. *Id.*
20. The finding of the fact of the delivery and acceptance of the deeds of partition in this case, being supported by a strong preponderance of testimony, must be affirmed. *Id.*

LAW. See *Appeals*, 2, 4, 11, 14, 15, 16; *Charge of Judge to Jury*; *Declaration*; *Demurrer*; *Ejectment*, 5; *Parties*, 3; *Pleading (Law)*; *Rules of Court*; *Verdict and other special titles*.

PRESUMPTION. See *Charge of Judge to Jury*, 5, 9.

PRESUMPTIONS. See *Sheriff's Sale*, 1.

PRINCIPAL AND AGENT. See *Insurance*, 3.

PRINCIPAL AND INTEREST. See *Administrators and Executors*, 7, 11, 17, 18; *Partners*, 3.

1. The rate of interest contracted to be paid attends the contract until the principal is paid, or the contract extinguished, where the debtor has violated his agreement to pay by a certain day. Any

**PRINCIPAL AND INTEREST—(Continued.)**

other rule might make it profitable to violate contracts, a doctrine not conducive to commercial morality and integrity. *Lewis vs. Jefferson County*, 980.

**PRINCIPAL AND SURETY.** See *Administrators and Executors*, 19.

**PRIORITIES.** See *Lien*, 2, 3, 4.

**PROCEEDINGS AD QUOD DAMNUM.** See *Eminent Domain*.

**PROCEEDING IN REM.** See *Constitutional Law*, 5.

**PROHIBITION, WRITS OF.** See *Eminent Domain*, 11.

1. The dismissal of a rule to show cause why a writ of prohibition should not be granted is a final judgment upon the suggestion filed and the facts therein contained, from which an appeal lies. *Singer Manufacturing Co. vs. Spratt*, 122.

2. The power to issue a writ of prohibition as an original proceeding does not belong to the Circuit Courts, and can be issued by them only as ancillary to a jurisdiction already acquired. *Id.*

**PROMISSORY NOTES.** See *Bills of Exchange; Tender* 1.

**PUBLIC ROADS—**

1. The 18th section of the Internal Improvement Act of 1855, in exempting the employees of certain railroads from duty of working on public roads, gave an immunity to such employees, but such immunity was not in the nature of an irrevocable contract with the roads or the laborers. The repeal of the immunity and imposing the duty was within the discretion of the Legislature. *Ex parte Thompson*, 887.

**PUBLIC SALES.** See *Sheriff's Sale*, 1.

**QUO WARRANTO—**

1. Leave to file an information in the nature of a *quo warranto* may be granted for the purpose of determining the right of contending parties to exercise an office or franchise pertaining to a private corporation created for benevolent purposes. *Davidson vs. State ex rel.*, 784.

**RAILROADS.** See *Eminent Domain; Injunction*, 8; *Lien*, 1; *Nuisance*.

**RECEIVERS.** See *Married Women*, 3; *Pleading (Equity)*, 4.

1. A surety for a debt of a deceased intestate, the debt being due, has a provable claim against the estate. *Walker vs. Drew*, 908.

2. In the absence of a legal personal representative of a deceased intestate a creditor of such intestate has no equity to have a receiver appointed to collect the assets and administer the estate; this, in a suit by such creditor against an alleged wrongful executor, a creditor of the intestate, and a debtor to the intestate. *Id.*

RECORDING ACTS OR STATUTES. See *Registry Laws*.

RECORDS. See *Appeals*, 3; *Evidence and Witnesses*, 2, 4, 15, 16, 17; *Municipal Corporations*, 11.

RE-ESTABLISHMENT OF LOST PAPERS. See *Amendments; Pleading*, 5; *Administrators and Executors*, 1, 2.

REFEREES. See *Evidence and Witnesses*, 9; *New Trial*, 3, 10.

1. A referee is a judicial officer appointed by the Circuit Court, and the order appointing him, though irregular, makes him an officer *de facto*, whose title cannot be assailed in a collateral proceeding. If the appointment be irregularly made the remedy for the error is by motion in the same court or by appeal. *Rushing vs. Thompson's Executors*, 583.

REGISTRY LAWS. See *Deeds*, 3, 4; *Lien*, 2, 3, 4.

REMITTITUR. See *Landlord and Tenant*, 8.

REPLEVIN—

1. In an action of replevin, on the trial and before instructing the jury, the court asked the plaintiff to elect whether he would take the property or its value in case he should have a verdict, and plaintiff elected to take the value, the property having been redelivered to the defendants. Thereupon the court charged the jury that if they found for the plaintiff they should "assess the damages at whatever sum may have been proven as the value" of the property, and the jury found for the plaintiff and "assessed the damages" at a sum warranted by the proof of the value. Judgment having been entered for the amount of damages so found, defendants moved to vacate the judgment on the ground that the verdict should have assessed the *value* of the property and not *damages*, which motion was denied. On appeal it is held that the finding of the sum as "damages" was, under the circumstances and the charge of the court, a finding of the "value of the property," and the plaintiff electing to take judgment for the value was entitled to his judgment for the amount so found by the jury, and there is no substantial error in the judgment. *Jeffreys vs. Stribling*, 819.

RES ADJUDICATA. See *Criminal Law*, 23, 24, 25; *Decrees and Judgments*, 1.

RULES OF COURT. See *Ejectment*, 5; *Pleading (Equity)*, 4; *Practice (Equity)*, 6, 7, 8, 9, 10, 11, 12.

SALES. See *Contracts; Sheriff's Sales*, 1; *Vendor and Purchaser*.

SEALS. See *County Seal*.

SET-OFF—

1. A set-off is allowed in an action on contract, only of matters grow-

**SET-OFF—(Continued.)**

ing out of contract. Damages sustained by reason of annoying suits, malicious prosecutions, slander of title, injury to one's credit occasioned by such proceedings, though relating to the subject matter of plaintiff's suit, cannot be set off. *Matthews vs. Lindsay*, 962.

**SCIRE FACIAS QUARE EXECUTIONEM NON.** See *Decrees and Judgments*, 3, 4.

**SHERIFF'S SALES.** See *Tender*, 2.

1. A *bona fide* purchaser of property at a sheriff's sale is protected by the presumption that the judgment of a competent court has been correctly rendered and that the execution in the hands of the officer has been regularly issued. He may fairly presume that the sheriff has acted in the discharge of official duty according to law. *Coker vs. Dawkins*, 141.
2. At public sales by auction, there being no fraud or unfairness, as soon as the hammer is struck down the bargain is considered as concluded, and the seller has no right afterward to accept other bids nor the buyer to withdraw from the contract. *Id.*
3. Equity will not set aside a public sale not tainted with fraud or unfairness, and upon the sole ground of inadequacy of price. Property offered for sale by auction is offered to be sold for what it will bring, and unless the inadequacy of price is so unconscionable as to demonstrate some gross imposition or undue influence a court should not annul the sale. *Id.*

**SPECIFIC PERFORMANCE.** See *Parent and Child*, 2; *Homestead and Exemptions*, 9.

**STATES.** See *Boundaries*.

**STATUTES AND STATUTORY CONSTRUCTION.** See *Constitutional Law*, 1, 2, 3; *Habeas Corpus*; *Internal Improvement Law*; *Landlord and Tenant*, 1, 2, 3, 4, 5, 6; *Licenses*; *Lien*, 5; *Mandamus*, 1; *Municipal Corporations*, 1, 2, 3, 4, 5, 6, 7, 8, 10, 11; *Writ of Error*, 3, 4

1. If the law had failed to require the Board of Commissioners to act upon such applications, it would have been totally inoperative to accomplish its expressed object. "Courts, in construing a statute, should, so far as the language will admit, give such a construction as will make it practicable, just and reasonably convenient." *State ex rel vs. Commissioners*, 425.
2. The title of a statute is "an act to amend section 23, of an act approved February 4th, 1869, entitled an act to provide for the incorporation of cities and towns and establish a uniform system of municipal government in the State." The body of the act containing the amend-

STATUTES AND STATUTORY CONSTRUCTION—(*Continued.*)

ment consists of three sections. The first section gives the city power to raise by tax and assessment money for general municipal purposes. The second section prescribes a method of valuation, limits the tax, and restricts appropriation. The third section legalizes assessments made before the passage of the act by the city according to the act then regulating assessments, and gives the power to enforce and collect the tax. The subject of the various sections of this act concerns the matter of taxation by cities for municipal purposes, and the general subject of the act as expressed in its title is the establishment of municipal governments. The act, therefore, is not in conflict with Section 14, Article IV, of the Constitution. The act embraces but one subject and matter properly connected therewith, and that subject the title briefly expresses. *Gibson vs. The State*, 16 Fla., 291, cited and followed. *City of Jacksonville vs. Barnett*, 525.

3. An assessment of a tax is declared illegal by the courts for want of power in the municipal government to impose such a tax. The Legislature subsequently legalizes the assessment and confers the power to levy the tax. The power to collect and to levy is not retrospective, and to the extent that the legalizing the assessment is retroactive, it is within the power of the Legislature, unless there is some other objection to it than that it is retroactive. If the assessment is such that the Legislature could have authorized at the time in the event the city had then the power to levy it, it can legalize it for future action by the city under the newly granted power. *Id.*
4. The Legislature does not by such act directly levy the tax. The whole machinery for its assessment and collection is put in operation by the city except the original power to collect such tax, and this is simply an assessment and collection of a tax by the city, which tax is authorized by the Legislature: *Quere.* Whether the Legislature can directly assess, levy and collect a tax of this character. (Section 6, Article XII, of the Constitution, construed so far as it relates to this legislation.) *Id.*

## STATUTE OF DESCENTS—

1. The fact that a testatrix by her will bequeaths certain mentioned property to her husband, and also certain other property to other relatives, but does not dispose of her entire property, is not evidence that she intends to exclude her husband from participating in the residue. *McDougald vs. Gilchrist's Executor*, 573.
2. Under the laws of this State, where the wife having separate property, dies without a child, but makes a will disposing of a portion only

## STATUTE OF DESCENTS—(Continued.)

of it, the surviving husband is entitled to the residue of such property, both real and personal, after the terms of the will have been carried out. McC. Dig. 471 §12. *Id.*

3. Under the act of 1872 defining the interest the wife shall take in her husband's property, if the husband dies out of this State intestate, without children, the widow is the sole heir at law. *Crolly vs. Clark and Alsop*, 849.

## STATUTE OF FRAUDS—

1. In a suit by appellants against respondents to recover upon their alleged special promise to pay a debt due appellants from H. B., the following paper was offered in evidence by plaintiffs: "Received of Mr. D. for E. & V. forty-nine 65-100 dollars as commission for guarantee of H. B's, account, which has been settled by him in full with note. [Signed] S. B. & Son." *Held*, That this is not a guaranty or a promise to pay the account of H. B., nor to pay notes given by H. B. *Eckman & Vetsberg vs. Brash & Son*, 763.
2. Such receipt is evidence of the payment and satisfaction of commissions upon a prior contract of guaranty of the payment of an account which has been settled by note, which contract of guaranty is not contained in the receipt, but is evidently independent of it. *Id.*
3. Nor is this receipt evidence of money paid by plaintiffs for and at the request of defendants, nor of money due on account stated, under the common counts. *Id.*
4. Every agreement which is required to be in writing, under the statute of frauds, must be certain in itself, or capable of being made so by a reference to something else whereby the terms can be ascertained with reasonable certainty, without reference to parol proof. The entire agreement must be in writing and signed by the party to be charged. *Id.*

STATUTE OF LIMITATIONS. See *Criminal Law*, 2, 21.

1. The statutory limitation to an action upon a judgment in this State is twenty years. Where the judgment is against a dissolved corporation, the time which has expired is fifteen years, and during the greater part of this time there was no corporation in existence from which payment of interest or principal of the judgment debt could have been demanded, or against which proceedings to revive the judgment for the purpose of obtaining an execution thereon could be had, and there is no circumstance from which payment could be inferred, a court of equity will not refuse to enforce the judgment on the ground of laches or pre-

STATUTE OF LIMITATIONS—(*Continued.*)

sumed payment of the debt. *Buckmaster vs. Kelley*, 15 Fla., 195, cited and followed. *Howe vs. Robinson*, 352.

2. An adverse possession of land under claim of title of less than seven years does not bar the right of action of the true owner or his grantees. Where the defendant in ejectment is in actual possession, the plaintiff cannot recover where he fails to show legal title in himself or that he was a prior actual occupant ousted by the defendant. *Simmons et al. vs. Spratt*, 495.

SUBROGATION. See *Parties*, 1.

SURPLUSAGE. See *Pleading (Equity)*, 1.

TAXES AND TAX TITLES. See *Constitutional Law*, 7, 8, 9; *Injunction*, 4, 5.

1. A tax deed, purporting on its face to have been executed within five days after the sale by the collector, is void. *Nral vs. Spooner*, 38.
2. A tax deed describing "one house and lot in Gainesville" is bad for uncertainty. *Walls vs. Endell et al.*, 86.
3. When a certificate of sale for taxes is issued to one person, and the tax deed is made to another, there must be some evidence that the certificate has been assigned by the original purchaser. A memorandum at the bottom of the deed, below the signatures of the clerk and witnesses, with no intelligible indication that it was a part of the deed, is not evidence of the assignment. *Florida Savings Bank vs. Brittain*, 507.
4. The city tax roll is proper evidence to show whether the land described in a tax deed was embraced in it and duly assessed for taxes. *Id.*
5. The law in force in 1874 required that a warrant should be issued to the Collector of City Taxes. His authority to enforce payment of such taxes by sale of property is derived from the statute controlling the levy and collection of State taxes. *Id.*
6. A deed of land sold for unpaid city taxes is properly made in the name of the city as grantor under the laws in force in 1876. *Id.*
7. Where in a suit in ejectment by a tax purchaser a deed purporting to have been made in pursuance of a sale for taxes under the act of 1874 is presented as evidence of title, and it is shown that no tax was imposed upon the property, the deed carries no right of action to the grantee as against the former owner, his heirs or assigns in actual possession. In such cases the limitations mentioned in Section 63, Chapter 1976, Laws of 1874, of causes for which a tax deed may be impeached, do not apply. *Id.*
8. Under the law of municipal corporations in this State they are au-



TAXES AND TAX TITLES—(*Continued.*)

thorized upon a vote of the electors to issue bonds to meet municipal expenses or for any municipal purpose. The statutes require that the amount to be issued, as well as the issuing of such bonds, shall be thus submitted to the electors, and in the event a required majority is given makes it the duty of the City Council to assess and collect such taxes from the citizens as are necessary for the payment of the interest as well as for the final payment of the bonds. The tax so directed to be levied is not a "special tax," within the meaning of Chapter 3313, Laws of 1881. *Sullivan vs. Walton*, 552.

9. There are outstanding bonds of a city which the city desires to compromise by an issue of new bonds to take up the outstanding bonds. The question of the issue of the bonds and the amount to be issued is submitted to the qualified electors of the city; the required majority is given for the issue and the amount to be issued; the statute in this event made it lawful for the bonds to be issued: *Held*, That the recital by the Mayor and Council in the proclamation submitting these questions that they were assured that the old bonds would be surrendered was no condition under the law for the issuing of the new bonds, and that the new bonds thus issued, if within the amount authorized and otherwise legal in the nature of their obligation under the statute, were valid and binding obligations upon the city. *Id.*
10. In such case the fact that the courts of the United States are entertaining jurisdiction to enforce the old bonds against the city does not prevent the city authorities from levying a tax to pay the new bonds to the extent to which an exchange has been made. *Id.*
11. A levy of general municipal taxes upon real and personal property in 1882 was not authorized by law, the power to assess having been abrogated by Chapter 3024, Laws of 1877, and the sale of land for taxes attempted to be levied in that year was properly enjoined. A dissolution of the injunction was erroneous. *Smith vs. Longe*, 697.
12. Such injunction will not operate to prevent the future collection of taxes, the levy of which was validated by Chapter 3477, Laws, approved March 5, 1883. The validity of that act was sustained in the case of *City of Jacksonville vs. Basnett*, decided at this term. *Id.*

TENANTS IN COMMON. See *Lien*, 3, 4.

## TENDER—

1. A tender of money due upon a promissory note or other contract is ineffectual unless followed by *proferi in curia*. *Matthews vs. Lindsay*, 962.
2. A mortgage is a security only, and is not extinguished by a tender after the day the money becomes due; and unless the tender is kept good and the money brought into court it will not stop the accruing of interest nor relieve from costs of suit. A purchase, therefore, at a sale under an execution against a mortgagor, the tender not being kept good, will not give the purchaser a title free of the mortgage. *Id.*

TESTE. See *Appeals*, 15, 16.

TRIALS DE NOVO. See *Writs of Error*, 2.

TRUSTS AND TRUSTEES. See *Administrators and Executors*, 9; *Corporations*, 2; *Homestead and Exemptions*, 9; *Wills*, 1, 2, 3, 4.

1. Trusts arising under a will are express trusts to be controlled and interpreted under the terms of the will. *Gale et ux. vs. Harby et als.*, 171.
2. Where, by a will, a portion of the property is devised or bequeathed to certain of the grandchildren of the testator, with directions to his executors to hold it in trust for and to use and control it for the interest of the grand children until they should marry or become of lawful age, when it was to be divided among them, the mother of such grandchildren acquires no interest in the property. *Id.*
3. Parol testimony is admissible to show that the grantees in a deed of conveyance of land absolute on its face, purchased as trustees, with a knowledge of the trust, that the cash paid at the time of the purchase was money realized from the sale of the trust property, and that subsequent payments of the balance of purchase money due was money realized from the use of the property purchased with the trust fund. A purchase with trust funds is virtually a purchase paid for by the *cestui que trust*. Such a purchase is a trust by operation of law not within the statute of frauds, and the fund may be followed so long as its general character can be identified. Where the grantees admitted the trust, and that the purchase was made with trust funds, as well as that they held as trustees, the trust arises by operation of law based upon presumed intention of the parties, and is a resulting trust. *Id.*
4. Where a party knows that he is dealing with trust funds he is held to knowledge of the character of the trust whether he advises himself of its precise nature or not. A knowledge of the fact that another person has equitable title to the fund is sufficient to

**TRUSTS AND TRUSTEES—(Continued.)**

charge him with knowledge of the character of the trust. *Id.*

5. Admission by parties sought to be charged as trustees that they were trustees sworn to by disinterested witnesses, such admissions being accompanied by corroborating circumstances, are evidence of the highest character. This in a suit to establish the trust against one who claims through the party so admitting the trust. So also is the fact that all the parties dealing with the estate admitted the existence of the trust for years admissible as evidence, as well as the fact that at the time of the purchase the financial condition of the party was such as "makes it impossible for him to have been the purchaser." *Id.*
6. Where the facts set forth in the bill disclose the nature of an express trust under a will that the character of the trust is misconceived and the effect of the devise or bequest not correctly stated is immaterial. The court will make its own conclusion from the facts stated and proved. *Id.*

**VENDOR AND PURCHASER.** See *Contracts*, 6; *Sheriff's Sales*, 1, 2, 3; *Tender*, 2.

1. A deed of land will not be annulled because of the failure to pay all of the purchase money. A remedy in equity may be to subject the land as for an equitable lien for the unpaid balance. *Marks vs. Baker*, 920.

**VENUE.** See *New Trial*, 7; *Criminal Law*, 20.

1. There is no provision of the statute authorizing a change of venue in criminal cases upon the ground that the Judge of the Circuit Court is disqualified. Relief may be had by the assignment of another Judge to hold the court and try the cause. *State ex rel. vs. King*, 19.

**VERDICT.** See *Ejectment*, 4; *New Trial*, 3.

**VOLUNTEER FIRE COMPANIES.** See *Contracts*, 1, 2, 3, 4.

**VOTERS, REGISTRATION OF.** See *Elections*.

**WAIVER.** See *Pleading (Law)*, 7.

**WILLS.** See *Administrators and Executors*, 1; *Homestead and Exemptions*, 3; *Evidence and Witnesses*, 4, 15, 16; *Trusts*, 1, 2.

1. The estate of a deceased testator is primarily liable to his debts. As to debts incurred by his executrix and executor subsequent to his death the estate is not liable unless the executrix and executor have power given them to create such charges upon the trust fund enforceable at the suit of the creditor, and such creditor dealing with the executrix and executor is held to notice of the trust and its nature. *Fridenburg vs. Wilson*, 359.

## WILLS—(Continued.)

2. When a testator directs his business to be carried on after his death, *prima facie* the only fund liable to subsequent creditors of his executors carrying on the business is that which was employed in the business by the testator. To authorize such creditors to resort to any other fund for payment the testator, by his will, must give the power in clear and unambiguous language. Where, in the will, there is a simple direction by the testator to his executor to carry on his business as he conducted it, so long as in his judgment it should be deemed best for his estate, to be closed and settled by his executor whenever he thought best to do so, and such will gives a power of sale of his real estate, no other portion of his estate is subject to debts incurred in the business by the executor except that which was employed in the business by the testator. *Id.*
3. A party loaning money to such executor to satisfy judgments obtained by a creditor against such executor for debts incurred in the business of the testator so continued after his death acquires no right against any of the estate not connected with the business at the death of the testator. Such portion of the estate as was not thus employed cannot be charged by a creditor. It is assets held by the executor in trust to pay *the debts of the testator*, and then to discharge legacies. To any proceedings seeking to charge such property for such debt the legatees and devisees having an interest under the will are necessary parties, and a judgment at law against the executor alone is not binding upon them. *Id.*
4. A power under a will to sell real estate, the subject of named trusts does not give authority to borrow money from third persons, and to thereby involve the whole of the trust property. *Id.*
5. The fact that a testatrix by her will bequeaths certain mentioned property to her husband, and also certain other property to other relatives, but does not dispose of her entire property, is not evidence that she intends to exclude her husband from participating in the residue. *McDougald vs. Gilchrist's Executor*, 573.
6. Under the laws of this State, where the wife having separate property, dies without a child, but makes a will disposing of a portion only of it, the surviving husband is entitled to the residue of such property, both real and personal, after the terms of the will have been carried out. *McC. Dig. 471, §12. Id.*
7. A last will and testament devising lands, executed in New York having only two attesting witnesses, is of no effect in this State. As to real property in this State the estate of the deceased in such case is intestate. *Croly vs. Clark and Alsop*, 849.

WRIT. See *Appeals*, 16, 17, and *Particular Writs*.

WRIT OF ERROR—

1. Under the Laws of this State, Judges of the Circuit Courts are authorized to allow writs of error to issue in cases of misdemeanor, and crimes not capital, as well as in capital cases. *Williams vs. State*, 391.
2. The last clause of Section 7, of Chapter 3248, an act to provide summary proceedings against delinquent tenants, approved February 16, 1881, which provides that on an appeal from the judgment of the County Judge the Circuit Court shall try the case *de novo*, is inoperative. By the eleventh section of Article 6, of the Constitution, the power of the Circuit Court in such cases is appellate only, and an appeal, in the absence of a statute regulating the proceeding, gives the Circuit Court only such power as it would have by a common law writ of error. The act in other respects appears to be valid. *King vs. State*, 399.
3. A writ of error must be sued out in the name of a party to the record. If a person not a party to the record has such an interest as gives him the right to sue out a writ of error he must sue it out in the name of a party to the record. The parties of record here are to be as they are in the Circuit Court: *Quere*. Whether under our statute (Chapter 3129, Laws,) a municipal corporation can sue out a writ of error in the name of its officer to try the legality of the discharge of a prisoner from his custody, as marshal of the city, who was in his custody for an alleged violation of its ordinances. *Pensacola vs. Reese*, 437.
4. The statute of this State regulating proceedings upon writs of *habeas corpus* does not authorize the State, or any political sub-division of the State, or any officer of either of them, to prosecute a writ of error to a judgment discharging a prisoner from confinement. The various sections of said statute (Chapter 3129, Laws) considered with reference to this subject. *Gagnet vs. Reese*, 438.
5. This court, on writ of error, will consider only such questions as are presented upon the record of the proceedings in the Circuit Court. We cannot assume that facts appeared on the hearing below which are not disclosed by the record. *Ex parte Powell*, 806.
6. Facts or documents appearing of record in another cause should be proved by the record of that cause; and if the same are not incorporated in the record this court cannot consider them on appeal of error. *Id.*
7. Petitioner having been discharged from custody by writ of *habeas*

## WRIT OF ERROR—(Continued.)

*corpus*, was again arrested, and now on *habeas corpus* prays to be discharged because he is arrested for the same cause from which he was before discharged. The cause of the first arrest not being shown, there is no ground for relief. *Id.*

**CASES ARGUED AND ADJUDGED**  
**IN THE**  
**SUPREME COURT**  
**OF FLORIDA,**  
**DURING THE YEARS 1883-4.**

---

**REPORTED BY**  
**GEORGE P. RANEY,**  
**ATTORNEY-GENERAL.**

---

**VOLUME XX.**

---

**TALLAHASSEE, FLA.**  
**PRINTED AT THE FLORIDIAN BOOK AND JOB OFFICE.**  
**1885.**





# JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

---

HON. EDWIN M. RANDALL, Chief Justice.  
HON. JAMES D. WESTCOTT, JR.,  
HON. R. B. VAN VALKENBURGH, } Associate Justices.

---

ATTORNEY-GENERAL.

GEORGE P. RANEY.

---

CLERK SUPREME COURT.

CHARLES H. FOSTER.

---

## JUDGES OF THE CIRCUIT COURTS.

FIRST CIRCUIT—HON. AUGUSTUS E. MAXWELL.

SECOND CIRCUIT—HON. DAVID S. WALKER.

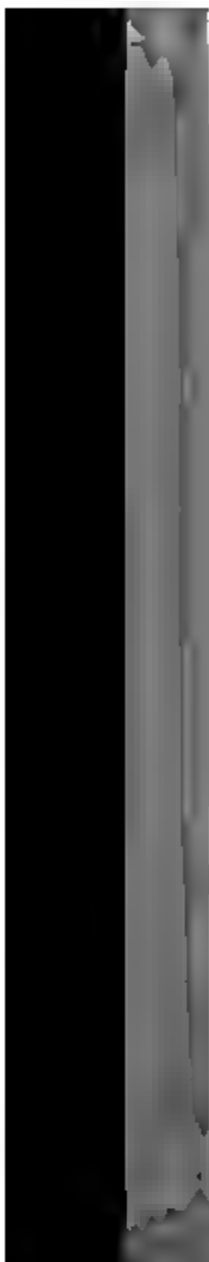
THIRD CIRCUIT—HON. ENOCH J. VANN.

FOURTH CIRCUIT—HON. JAMES M. BAKER.

FIFTH CIRCUIT—HON. THOMAS F. KING.

SIXTH CIRCUIT—HON. H. L. MITCHELL.

SEVENTH CIRCUIT—HON. WM. ARCHER COCKE.



## TABLE OF CASES.

---

	PAGE.
Aetna S. F. E. Company, City of Jacksonville v.....	100
Anderson v. State.....	381
Atkinson, Pensacola & Atlantic R. R. Co. v.....	450
Avery <i>et al.</i> v. City of Pensacola.....	551
 Baker, Circuit Judge <i>et al.</i> , State <i>ex rel.</i> v.....	 616
Baker, Marks v., .....	920
Ballard <i>et al.</i> v. Eckman & Vetsburg.....	661
Basnett <i>et al.</i> , City of Jacksonville v.....	525
Belote v. O'Brian's Admr.....	126
Benner <i>et al.</i> , Street <i>et al.</i> v.....	700
Blackshear & Co., West v.....	457
Blanchard <i>et al.</i> v Raines .....	467
Blige v. State.....	742
Boniel, New Orleans I. Association v., .....	815
Boswell v. State, .....	869
Bowden, Deans, v., .....	905
Bradley v. State.....	738
Brash & Son, Eckman & Vetsburg v., .....	763
Brittain <i>et al.</i> , Florida Savings Bank v.....	507
Brokaw v. McDougall <i>et als.</i> .....	212
Brown, State <i>ex rel.</i> v.....	407
 Campbell v. Spratt <i>et al.</i> .....	 122
Canepa, Executor, Eppinger, Russell & Co. v.....	262
Caro v. Maxwell.....	17
Carter's Administrators v. Carter <i>et al.</i> .....	558
Carter's Administrators, Horne v.....	45
Carter v. State .....	745

	PAGE.
Chesser <i>et al.</i> v. DePrater.....	691
City of Jacksonville v. AEtna S. F. E. Company.....	100
City of Jacksonville v. Basnett <i>et al.</i> .....	525
City of Jacksonville v. L'Engle.....	344, 352
City of Pensacola, Avery <i>et al.</i> v.....	551
City of Pensacola v. Reese.....	437
Clark v. Rugg, .....	861
Clark and Alsop, Crolly v.; .....	849
Coffee v. Grover.....	64
Coker v. Dawkins.....	141
Coleman, Jeffreys <i>et al.</i> v.....	536
Commissioners of Jefferson County, State <i>ex rel.</i> v....	425
Commissioners of Sumter County, State <i>ex rel.</i> v., .....	859
Cook v. State, .....	802
Cooper, County Judge, State <i>ex rel.</i> v.....	547
Cox v. State, .....	839
Crolly v. Clark & Alsop, .....	849
Davidson v. State <i>ex rel.</i> , .....	784
Dawkins, Coker v.....	141
Deans v. Bowen, .....	905
Deans v. King's Executrix.....	533
DePrater, Shesser <i>et al.</i> v.....	691
Dickson v. State, .....	800
Drew <i>et als.</i> , Walker <i>et als.</i> v., .....	908
Dubois v. Holmes, .....	834
Dunbar v. Wright's Adm'r.....	446
Eckman & Vetsburg, Ballard <i>et al.</i> v.....	661
Eckman & Vetsburg v. Brash & Son, .....	763
Eldridge, Dunham & Co. v. Post.....	579
Eldridge <i>et ux.</i> v. Wightman & Christopher.....	687
Elliott, Joost v., .....	924
Endell <i>et al.</i> , Walls v.....	86
Eppinger, Russell & Co. v. Canepa, Executor.....	262
Ernest v. State.....	383
<i>Ex parte</i> Powell, .....	806

	PAGE.
<i>Ex parte</i> Thompson, .....	887
Florida Savings Bank v. Brittain et al.....	507
Florida Savings Bank, Walter v., .....	826
Fridenburg v. Wilson, Executrix <i>et als.</i> .....	359
Gagnet v. Reese .....	438
Gainer <i>et al.</i> v. Russ.....	157
Gale <i>et ux.</i> v. Harby <i>et al.</i> .....	171
Garnett <i>et ux.</i> v. Jacksonville, S. A. & H. R. R. Co. ....	889
Gilchrist's Executor <i>et al.</i> , McDougald <i>et al.</i> v.....	573
Gooding, Mull & Co., Reed v., .....	773
Groover, Coffee v.....	64
Greeley and Blaisdell, Lara, Ross & Co. v., .....	926
Greeley v. Jeffreys & Stribling, .....	819
Hammond, Wharton v., .....	934
Harby <i>et al.</i> , Gale <i>et ux.</i> v.....	171
Hart, Executrix <i>et als.</i> , Stribling <i>et ux</i> v.....	235
Hart's Executor v. Smith.....	58
Harwood <i>et ux.</i> v. Root <i>et ux.</i> , .....	941
Hayden v. Thrasher <i>et al.</i> .....	715
Holmes, Dubois v., .....	834
Horne v. Carter's Administrators.....	45
Howard v. Moore <i>et al.</i> .....	163
Howe v. Robinson <i>et ux.</i> .....	352
Hubbard, McClenny v.....	541
Hutchinson, Richardson v.....	21
Jacksonville S. A. & H. R. R. Co., Garnett <i>et ux.</i> v.....	889
Jacksonville, T. & K. W. R. Co. <i>et als.</i> , Moody <i>et ux.</i> v.....	597
Jacksonville, T. & K. W. R. Co., State <i>ex rel.</i> v.....	616
Jeffreys <i>et al.</i> v. Coleman .....	536
Jefferson County v. Lewis & Sons, .....	980
Jeffreys & Stribling v. Greeley, .....	819

	PAGE.
Joiner, Mills <i>et ux.</i> v.....	479
Joost v. Elliott, .....	924
King, Circuit Judge, State <i>ex rel.</i> v.....	19, 399
King's Executrix, Deans v.....	533
Knight <i>et al.</i> v. Weiskopf <i>et al.</i> .....	140
Knox <i>et al.</i> , Montgomery <i>et al.</i> v.....	372
Lake's Administrator, Snow <i>et al.</i> v.....	656
Lara, Ross & Co. v. Greeley and Blaisdell, .....	926
L'Engle, City of Jacksonville v.....	344, 352
Lewis & Sons, Jefferson County v., .....	980
Lindsay <i>et als.</i> , Matthews <i>et al.</i> v., .....	962
Longe, Smith v.....	697
Marks v. Baker, .....	920
Matheson <i>et al.</i> v. Thompson, .....	790
Matthews <i>et al.</i> v. Lindsay <i>et als.</i> , .....	962
Maxwell, Caro v.....	17
McClenny v. Hubbard .....	541
McClerkin v. State, .....	879
McDougall <i>et als.</i> , Brokaw v.....	212
McDougald <i>et al.</i> v. Gilchrist's Executor <i>et al.</i> .....	573
McLean v. Spratt.....	515
McLean v. Spratt <i>et al.</i> .....	122
Merritt & Son v. Wittich.....	27
Metzger <i>et al.</i> , Price v.....	683
Mills <i>et ux.</i> , v. Joiner .....	479
Montgomery <i>et al.</i> v. Knox <i>et al.</i> .....	372
Moody <i>et ux.</i> v. Jacksonville, T. & K. W. R. Co. <i>et als.</i> .....	597
Moore <i>et al.</i> , Howard v.....	163
National Bank, Wittich, v., .....	843
Neal <i>et al.</i> v. Spooner <i>et al.</i> .....	38
New Orleans I. Association v. Boniel, .....	815
Nims v. Nims.....	204

	PAGE.
O'Brian's Adm'r, Belote v.....	126
O'Neil v. Percival <i>et ux.</i> , .....	937
Pells v. State, .....	774
Pendry v. Wright <i>et als.</i> , .....	828
Pensacola & Atlantic R. R. Co. v. Atkinson.....	450
Percival <i>et ux.</i> , O'Neil v.,.....	937
Post, Eldridge, Dunham & Co. v.....	579
Powell, <i>ex parte</i> , .....	806
Price v. Metzger <i>et al.</i> .....	683
Raines, Blanchard <i>et al</i> v.....	467
Read v. Gooding, Mull & Co., .....	773
Reese, City of Pensacola v.....	437
Reese, Gagnet v.....	438
Richardson v. Hutchinson.....	21
Robinson v. State, .....	804
Robinson <i>et ux.</i> , Howe v.....	352
Ross, Keen & Co. v. Steen.....	443
Root <i>et ux.</i> , Harwood <i>et ux.</i> v., .....	941
Rugg, Clark v., .....	861
Rushing <i>et ux.</i> v. Thompson's Executors.....	583
Russ, Gainer <i>et al</i> v.....	157
Sanderson v. Sanderson's Administrators.....	292
Sanderson's Administrators v. Sanderson.....	292
Simmons <i>et al</i> v. Spratt.....	495
Singer Manufacturing Company v. Spratt <i>et al.</i> .....	122
Small v. State, .....	780
Smith, Hart's Executor v.....	58
Smith v. Longe.....	697
Smith v. State, .....	839
Snow <i>et al.</i> v. Lake's Adm'r.....	656
Spooner <i>et al.</i> Neal <i>et al.</i> v.....	38
Spratt, McLean v.....	515
Spratt, Simmons <i>et al.</i> v.....	495
Spratt <i>et al.</i> , Campbell v.....	122

	PAGE.
Spratt <i>et al.</i> , McLean v.....	122, 515
Spratt <i>et al.</i> , Singer Manufacturing Company v.....	122
State, Anderson v.....	381
State, Blige v.....	742
State, Boswell v., .....	869
State, Bradley v.....	738
State, Carter v.....	754
State, Cook v., .....	802
State, Cox v., .....	839
State, Dickson v., .....	800
State, Ernest v.....	383
State, McClerkin v., .....	879
State, Pells v., .....	774
State, Robinson v., .....	802
State, Small v., .....	780
State, Smith v., .....	839
State, Whitehead, v., .....	841
State, Williams v., .....	777
State, Williams v.....	391
State <i>ex rel.</i> v. Baker, Circuit Judge, <i>et al.</i> .....	616
State <i>ex rel.</i> v. Brown.....	407
State <i>ex rel.</i> v. Commissioners of Jefferson County .....	425
State <i>ex rel.</i> v. Commissioners of Sumter County, .....	859
State, <i>ex rel.</i> v. Cooper, County Judge.....	547
State <i>ex rel.</i> , Davidson v., .....	784
State <i>ex rel.</i> v. Jacksonville, T. & K. W. R. Co.....	616
State <i>ex rel.</i> v. King, Circuit Judge.....	19, 399
State <i>ex rel.</i> v. Trustees I. I. Fund.....	402
Steen, Ross, Keen & Co. v.....	443
Street <i>et al.</i> v. Benner <i>et al.</i> .....	700
Stribling <i>et ux.</i> v. Hart, Executrix, <i>et als.</i> .....	235
Sullivan v. Walton.....	552
Tischer v. Wall, .....	924
Thrasher <i>et al.</i> , Hayden v.....	715



	PAGE.
Thompson, <i>ex parte</i> , .....	887 .
Thompson, Matheson <i>et al.</i> v., .....	790
Thompson's Executors, Rushing <i>et ux.</i> v.....	583
Trustees I. I. Fund, State <i>ex rel.</i> v.....	402
Wall, Tischler v., .....	924
Walls v. Endell <i>et al.</i> .....	86
Walker, <i>et als.</i> v. Drew <i>et als.</i> , .....	908
Walter v. Florida Savings Bank, .....	826
Walton, Sullivan v.....	552
Weiskopf <i>et al.</i> , Knight <i>et al.</i> , v.....	140
West v. Blackshear & Co.....	457
Whitehead v. State, .....	841
Wilson, Executrix, <i>et als.</i> , Fridenburg v.....	359
Wharton v. Hammond, .....	934
Wightman & Christopher, Eldridge <i>et ux.</i> v.....	687
Williams v. State.....	391
Williams v. State, .....	777
Wittich, Merritt & Son v.....	27
Wittich v. National Bank, .....	843
Wright's Adm'r, Dunbar v.....	446
Wright <i>et al.</i> , Pendry v., .....	828





